TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 305

WAYNE UNITED GAS COMPANY, PETITIONER,

vs.

OWENS-ILLINOIS GLASS COMPANY, LIBBEY-OWENS-FORD GLASS COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 22, 1936.

CERTIORARI GRANTED OCTOBER 12, 1936.

SUPREME COURT OF THE UNITED STATES

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INDEX.

	Page
Record from D. C. U. S., Southern District of West Virginia	1
Caption	1
Order of March 2, 1936, dismissing debtor's petitions	1
Order filing petition for rehearing	4
Petition for rehearing, etc.	6
Petitioner's assignment of errors	14
Order setting aside order of March 2, 1936, and granting rehearing	18
Order of May 28, 1936, disapproving and dismissing debtor's petitions	19
Debtor's second amended and supplemental petition	25
Exhibit "C"—Resolution of Board of Directors	47
Assignment of errors and prayer for reversal	49
Clerk's certificate	54
Proceedings in U. S. C. C. A., Fourth Circuit	55
Docket entries	55
Notice of motion of appellees to dismiss appeal	56
Motion of appellees to dismiss appeal	57
Argument of cause on motion to dismiss	58
Per curiam opinion	58
Decree	60
Stipulation as to record upon petition for writ of certiorari	61
Order staying mandate	63
Clerk's certificate	64
Order allowing certiorari	65

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TRANSCRIPT OF RECORD

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON.

In the Matter of

WAYNE UNITED GAS COMPANY,
DEBTOR,

No. 3187. In Bankruptcy.

Fred O. Blue, Esq., and Robert S. Spilman, Esq., for Appellant; W. James MacIntosh, Esq., Rummel, Blagg & Stone, Thomas B. Jackson, Esq., and Brown, Jackson & Knight, for Appellees.

(Be it Remembered that heretofore, to-wit: At a District Court of the United States for the Southern District of West Virginia, at Charleston, in said District, on March 2, 1936, the following order was entered of record:)

(2) **ORDER**

In the Matter of

WAYNE UNITED GAS COMPANY,
A CORPORATION,
Debtor.

In Bankruptcy. No. 3187.

On the 7th day of February, 1936, came Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, by W. James MacIntosh and Rummel, Blagg & Stone, their attorneys, and tendered their joint and separate objections to the approval of the original petition filed herein by the Debtor, Wayne United Gas Company, on the 25th day of November, 1935, and the amended and supplemental petition of said Debtor filed

herein on the 10th day of December, 1935, and their joint and separate motion to dismiss the said petitions, together with the several exhibits referred to in said written objections and motions; which said objections, motion, and accompanying exhibits, having been seen and inspected by the Court, are now ordered to be filed herein. And at the same time came also the Chase National Bank of the City of New York, a corporation, and Paul C. Beardslee, Trustees under the indenture of mortgage of the Wayne United Gas Company dated June 1, 1929, securing its 6.50 per cent sinking fund convertible gold bonds, by Brown, Jackson & Knight and Milbank, Tweed, Hope & Webb, their attorneys, and here tendered their written appearance and answer to the petitions of the Debtor filed herein as aforesaid, which said appearance and answer, being seen and inspected by the Court, are now ordered to be filed herein.

And thereupon on said last mentioned date came also the Debtor, Wayne United Gas Company, by Blue, Dayton & Campbell and Price, Smith & Spilman, its attorneys, and moved the Court to approve its said several (3) petitions theretofore filed herein as aforesaid, as properly filed under the provisions of Section 77B of the Bankruptcy Act, which motion was resisted by the said Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, and by said Chase National Bank of the City of New York and Paul C. Beardslee, Trustees; and upon the hearing of said motion, petition and objections the Debtor and said Glass Companies here tendered and filed their written stipulation relative to the filing and consideration of the said several exhibits referred to in said written objections and motion of the Glass Companies; and the Debtor also tendered and filed, by agreement of counsel, a printed copy of the general mortgage indenture executed by the Wayne United Gas Company under date of June 1, 1929; and thereupon, on said date, all matters arising upon the said petitions of the Debtor, upon its motion to approve the same, upon the said objections of said Glass Companies, and their motion to dismiss the said petitions, and upon said answer of the above named Trustees, were fully heard upon the record and the arguments of counsel.

And now, on this 2nd day of March, 1936, the Court,

having maturely considered the matters aforesaid, is of opinion, and doth accordingly find, that the said several petitions of the Debtor, and the plan of reorganization set out and described therein, do not present a feasible method of re-organizing the Debtor corporation, and do not adequately or fairly provide for the protection of the rights and interests of the holders of the first mortgage bonds of the Debtor as required by law, or for the realization by them of the value of their interests or liens, and that the holders of more than 92 per cent of said bonds have refused to approve or accept said plan; and the Court is further of opinion and doth find that said petitions do not comply with the provisions of said Section 77B of the Bankruptcy Act, and are not filed in good faith within the meaning of said Act. It is therefore adjudged, ordered and decreed that said petitions and each of them be and the same are hereby disapproved, and that the same be dismissed; to which action of the Court, the Debtor, Wayne United Gas Company, (4) objected and excepted.

It is further adjudged, ordered and decreed that the Debtor, Wayne United Gas Company, do pay to the objectors, Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, and to said Chase National Bank of the City of New York and Paul C. Beardslee, Trustees, their costs about their defense to said petitions in this Court in this behalf expended. And nothing further remaining to be done herein, it is further ordered that this cause be retired from the docket.

And the Debtor, Wayne United Gas Company, indicating to the Court its desire and purpose to apply to the United States Circuit Court of Appeals for the Fourth Circuit for an appeal or review of this decree in the manner provided by law, it is further ordered that the effect of this decree be stayed for the period of thirty days from this date to enable the said Debtor to make such application.

(And on another day, to-wit: At a District Court of (5) the United States for the Southern District of West Virginia, at Charleston, in said District, on April 24, 1936).

ORDER

IN THE MATTER OF

WAYNE UNITED GAS COMPANY,
DEBTOR,

No. 3187—In Bankruptcy.

THIS 24th day of April, 1936, came the Wayne United Gas Company, the above named debtor, and tendered and asked leave to file its petition praying that the order or decree entered by this Court in the above styled proceeding on the 2nd day of March, 1936, be set aside, vacated and annulled, and that a rehearing or a review of all matters arising in the above styled proceeding be granted and awarded to the said petitioner, because of error in said order or decree upon the grounds as set forth in the assignment of errors presented therewith, and that upon a rehearing, that an order or decree be entered herein granting and awarding to the petitioner the relief prayed for in its original and amended and supplemental petitions, and with said petition tendered its assignment of errors, marked for identification "Petitioner's Assignment of Errors," and attested copy of said order or decree entered on said 2nd day of March, 1936, marked for identification "Exhibit Decree," and notice in writing to the Owens-Illinois Glass Company, a corporation, Libbey-Owens-Ford Glass Company, a corporation, The Chase National Bank, a banking association under the laws of the United States of America, Trustee, and Paul C. Beardslee, Trustee, dated the 16th day of April, 1936, and accepted by counsel of record on the 17th day of April, 1936, which notice, for identification, is marked "Notice of Motion for Leave to File Petition for Rehearing, Etc." and "Motion for Rehearing, etc."

And came also the Owens-Illinois Glass Company, a corporation, and Libbey-Owens-Ford Glass Company, a corporation, by counsel, and The Chase National Bank, (6) Trustee, and Paul C. Beardslee, Trustee, by counsel, and jointly and severally objected to the filing of said petition for rehearing and the several exhibits and

the assignment of errors presented therewith, and jointly and severally objected to the granting of the relief prayed for in said petition for rehearing, or any part thereof, on the ground that the Court has no jurisdiction of the matters set forth in said petition for rehearing and exhibits, and upon the further ground that no cause is shown for the filing thereof or for the granting of the relief therein prayed for.

Upon consideration whereof, it is ordered and decreed that leave to file said petition for rehearing, said exhibits, and petitioner's assignment of errors be, and the same is hereby given, and the same are ordered to be, and accordingly are, filed.

And at the same time said Wayne United Gas Company moved the Court to set aside, vacate and annul the said order or decree entered herein on the 2nd day of March, 1936, because of error therein as set forth in assignment of errors and for a rehearing or a review of all matters arising upon the record in the above mentioned proceedings, and upon the assignment of errors, and that, upon a rehearing, an order or decree be entered by this Court giving and awarding the Wayne United Gas Company the relief prayed for in its original and supplemental petitions, which motion was resisted by the Owens-Illinois Glass Company, Libbey-Owens-Ford Glass Company, The Chase National Bank, Trustee, and Paul C. Beardslee, Trustee, by counsel.

And all questions arising upon the prayer of said petition, the exhibits therewith, the assignment of errors, and upon the above mentioned motion, with objections and resistance thereto of the parties above named, were fully heard and argued by counsel. Thereupon, the Court takes time to consider of its judgment.

(The petition for rehearing and exhibits therewith, referred to in the foregoing order, are in the words and figures as follows:)

THE PETITION OF THE WAYNE UNITED GAS COMPANY, A CORPORATION, PRAYING THAT THE ORDER OF DECREE ENTERED BY THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, BE SET ASIDE, VACATED AND ANNULLED, AND THAT THE PETITIONER BE GRANTED AND AWARDED A REHEARING, OR REVIEW, OF ALL MATTERS ARISING IN THE ABOVE STYLED PROCEEDINGS, BECAUSE OF THE ERRORS AS SET FORTH IN THE ASSIGNMENT OF ERRORS PRESENTED HEREWITH, AND, UPON A REHEARING, OR REVIEW, THAT AN ORDER BE ENTERED BY THE SAID DISTRICT COURT GRANTING AND AWARDING TO THE PETITIONER, THE SAID WAYNE UNITED GAS COMPANY, THE RELIEF PRAYED FOR IN ITS ORIGINAL AND AMENDED AND SUPPLEMENTAL PETITIONS.

(7) (Filed April 24, 1936)

In the matter of

WAYNE UNITED GAS COMPANY, DEBTOR.

No. 3187—In Bankruptcy.

TO THE HONORABLE GEORGE W. McCLINTIC, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA:

Your petitioner, the Wayne United Gas Company, a corporation organized and existing under the laws of the State of West Virginia, feeling itself aggrieved by the order or decree made and entered by the said District Court in the above styled proceedings on the 2nd day of March, 1936, dismissing your petitioner's Original and Amended and Supplemental Petitions, therein praying that your petitioner be reorganized pursuant to Section 77B of the Bankruptcy Act, and being advised that the said order or decree is erroneous, and to its prejudice, your petitioner does hereby petition and pray that

the said order or decree, entered on said 2nd day of March, 1936, be set aside, vacated and annulled, and that a rehearing or review of all matters arising in the above styled proceedings be granted and awarded to your petitioner because of error in said order or decree, upon the grounds as set forth in the Assignment of Errors presented herewith, and, upon a rehearing, that an order (8) or decree be entered herein granting and awarding to your petitioner the relief prayed for in its Original and Amended and Supplemental Petitions. A duly certified copy of said order or decree entered on said 2nd day of March, 1936, is filed herewith as a part hereof marked for identification "Exhibit Decree."

Your petitioner is advised that the order or decree entered by said District Court on the 2nd day of March, 1936, is erroneous, and to the prejudice of the petitioner, and that the grounds of error are as set forth in the Assignment of Errors presented herewith and attached hereto, marked for identification "Petitioner's Assignment of Errors."

Your petitioner respectfully represents:

I.

That the petitioner filed its Original Petition in the above styled proceedings on the 25th day of November, 1935, and its Amended and Supplemental Petition on the 10th day of December, 1935, praying that it be reorganized pursuant to Section 77B of the Bankruptcy Act; that on the 7th day of February, 1936, the Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company tendered their joint and separate objection to the approval of said petitions and their joint and separate motion to dismiss the same, together with the several exhibits referred to therein, and, at the same time, The Chase National Bank of the City of New York, a corporation, and Paul B. Beardslee, Trustees under the Indenture of Mortgage of your petitioner dated June 1, 1929, securing your petitioner's 6.50 per cent sinking fund convertible gold bonds, tendered their answer to the said petitions, which joint and separate objections, motion, and answer were on that day filed by order of said Court; and on said 7th day of February, 1936, all matters

arising upon said petitions, motion, objections, and answer were fully heard, together with the arguments of counsel.

(9) II.

That on, to-wit, the 2nd day of March, 1936, there was entered by the said District Court, an order or decree in the above styled proceedings, wherein were and are, the following findings and decree, namely—"that the said several petitions of the Debtor, and the plan of reorganization set out and described therein, do not present a feasible method of reorganizing the Debtor corporation, and do not adequately or fairly provide for the protection of the rights and interests of the holders of the first mortgage bonds of the Debtor as required by law, or for the realization by them of the value of their interests or liens, and that the holders of more than 92 per cent of said bonds have refused to approve or accept said plan; and the Court is further of opinion and doth find that said petitions do not comply with the provisions of said Section 77B of the Bankruptcy Act, and are not filed in good faith within the meaning of said Act. It is therefore adjudged, ordered and decreed that said petitions and each of them be and the same are hereby disapproved, and that the same be dismissed; to which action of the Court, the Debtor, Wayne United Gas Company, objected and excepted."

III.

That all parties concerned, as creditors or stockholders of your petitioner, were present by counsel at the hearing in the District Court, in the above styled proceedings, on February 7, 1936, except as to the holders of $61,000.00 principal amount out of $1,464,000.00 principal amount of your petitioner's outstanding first mortgage bonds, and approximately seven per cent of your petitioner's stockholders. At said hearing, the plan, as set out in the Amended and Supplemental Petition, was submitted and considered and the Court heard the arguments of counsel in support of, and against, the said plan.

While a hearing upon and consideration of a plan are
(10) had, ordinarily, as your petitioner is advised, only

after the requirements of paragraphs (a) (providing for the approval or disapproval of the petition) and (c) (providing for notice of hearing on the plan) of said Section 77B have been followed and complied with, yet, the aforesaid hearing and consideration of the plan, on the said 7th day of February, 1936, were, as your petitioner is advised, proper for the reason that the only creditors of your petitioner who refused to approve or accept the said plan had filed their objections thereto and presented their arguments thereon at the said hearing, and, therefore, for all practical purposes, as your petitioner is advised, the situation, at said hearing, was, on said 7th day of February, 1936, as though all of the requirements of paragraphs (a), (b) and (c) of said Section 77B of the Bankruptcy Act had been followed.

That the said District Court, as counsel for your petitioner interpreted the order or decree of March 2, 1936, as you petitioner is advised, was of the opinion that the plan considered at said hearing on February 7, 1936, was not feasible and that the same did not protect the first lien bondholders in the proper way, and, therefore, that the objections to the plan should be sustained and the petitions dismissed; and that the dismissal of the petitions was not based materially on the refusal of the Court to approve them as such, but was based on the Court's disapproval of the plan.

IV.

While the proceedings had since the entry of said order or decree of March 2, 1936, may not be relevant or material to the prayer of this Petition, yet, so that the Court may be fully advised in respect thereof, the petitioner further represents:

That the petitioner desiring to appeal from said order (11) or decree of March 2, 1936, to the United States Circuit Court of Appeals for the Fourth Circuit, and conceiving that it was required to do so under Section 24b of the Bankruptcy Act, under the situation mentioned in Paragraph III hereof and the interpretation of said order or decree of March 2, 1936, as aforesaid, filed its petition for an appeal under said Section 24b, in the office of the Clerk of the said United States Circuit Court

of Appeals for the Fourth Circuit, on the 20th day of March, 1936, together with its Assignments of Error and a duly certified copy of said order or decree of March 2, 1936, said United States Circuit Court of Appeals being then in vacation; that the first term of the said Circuit Court of Appeals, following the filing of said petition, Assignments of Error, and copy of order or decree therewith, began on Monday, April 6, 1936, and that petitioner, by counsel, on said last named date, appeared in open court and presented and submitted to the Court said petition applying and praying for an appeal under said Section 24b of the Bankruptcy Act, and thereupon Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, by counsel, likewise appeared in open court and opposed the same, and said Circuit Court of Appeals, after hearing the argument of counsel, took said petition under advisement.

That on, to-wit, the 15th day of April, 1936, the said United States Circuit Court of Appeals for the Fourth Circuit, entered an order upon and in respect of said petition praying for an appeal under said Section 24b, in the words and figures following:

"UNITED STATES CIRCUIT COURT OF APPEALS

"FOURTH CIRCUIT

(12) No. 4037.

"Wayne United Gas Company, a corporation, Debtor, Appellant,

vs.

"Owens-Illinois Glass Company, a corporation, Libbey-Owens-Ford Glass Company, a corporation, The Chase National Bank of the City of New York, a banking association under the laws of the United States of America, Trustee, and Paul C. Beardslee, Trustee, Appellees.

"ON PETITION for an appeal to superintend and revise, in matter of law, proceedings of the District Court of the United States for the Southern District of West Virginia, at Charleston. In Bankruptcy.

"UPON CONSIDERATION of the petition for an appeal under section 24b of the Bankruptcy Act in the above entitled matter,

"IT IS, FOR THE REASONS SET FORTH IN THE PER CURIAM OPINION THIS DAY FILED, ORDERED that the appeal prayed for, be, and the same is hereby, denied at the cost of the appellant.

"April 15th, 1936."

That, as appears in the per curiam opinion referred to in said order, the said Circuit Court of Appeals denied to your petitioner an appeal on the ground, as held by said Court, that an appeal lay, as a matter of right, under Section 25(a) of the Bankruptcy Act, and not upon petition or application thereto under Section 24b of the Bankruptcy Act.

V.

That the petitioner has given to Owens-Illinois Glass Company, a corporation, Libbey-Owens-Ford Glass Company, a corporation, The Chase National Bank of the City of New York, a banking association under the laws of the United States of America, Trustee, and Paul C. Beardslee, Trustee, notice in writing (the acceptance of which notice was endorsed thereon in writing on the 17th day of April, 1936, by counsel of record for said Glass Companies and Trustees) that petitioner would, at two o'clock on the afternoon of Friday, April 24, 1936, at the Court Room of the District Court of the United (13) States for the Southern District of West Virginia, in the City of Charleston, County of Kanawha, said State, and within said District, tender and ask leave of said District Court of the United States for the Southern District of West Virginia, to file this, its petition, praying that the order or decree entered by the said District Court in the above styled proceedings on the 2nd day of March, 1936, be set aside, vacated,

and annulled, and that a rehearing or review of all matters arising in the above styled proceedings be awarded to the said Wayne United Gas Company because of errors which will be set forth in the Assignment of Errors to be presented with said petition and filed therewith, if leave therefor be granted, and that, upon a rehearing an order or decree be entered by said District Court giving and awarding to the said Wayne United Gas Company the relief prayed for in its Original and Amended and Supplemental Petitions: And that the said Wayne United Gas Company will, at the same time and place, move said District Court to set aside, vacate, and annul the above mentioned order or decree entered by said District Court on the 2nd day of March, 1936, because of error therein as will be set forth in the Assignment of Errors to be then presented, and for a rehearing or review of all matters arising upon the record in the above mentioned proceedings and upon the Assignment of Errors, and that, upon a rehearing, an order or decree be entered by said District Court giving and awarding to the petitioner the relief prayed for in its Original and Amended and Supplemental Petitions; and will, at the same time and place, move the said District Court for any and all other general and special relief to which the petitioner may, in equity and good conscience, be entitled. The original of such notice, with the endorsed acceptance of counsel of record thereon, is filed herewith, as a part hereof, marked for identification "Exhibit Notice."

(14) PRAYER

Petitioner respectfully prays that the order or decree entered by the said District Court in the above styled proceedings, on the 2nd day of March, 1936, be set aside, vacated and annulled, and that a rehearing or review of all matters arising in the above styled proceedings be granted and awarded to said petitioner, because of error in said order or decree upon the grounds as set forth in the Assignment of Errors presented herewith; and, upon a rehearing, that an order or decree be entered herein granting and awarding to the petitioner the relief prayed for in its Original and Amended and Supplemental Petitions: and may petitioner have all such other further

general and special relief, to which it may, in equity and good conscience, be entitled, and it will ever pray, etc.

WAYNE UNITED GAS COMPANY,
Petitioner.
By FRED O. BLUE,
T. BROOKE PRICE,
Its Attorneys.

BLUE, DAYTON & CAMPBELL,
PRICE, SMITH & SPILMAN,
Of Counsel for Wayne United
Gas Company.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF WEST VIRGINIA.

I, N. R. NOFFSINGER am the President of the Wayne (15) United Gas Company, the corporation which is the petitioner mentioned and described in the foregoing petition, and I do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

N. F. NOFFSINGER.

Subscribed and sworn to before me this 18th day of April, 1936.

ALICE N. HARMISON,
Notary Public in and for the
County of Kanawha, State of
West Virginia.

My commission expires on the 28th day of March, 1940.

(Seal)

PETITIONER'S ASSIGNMENT OF ERRORS

(16) (Filed April 24, 1936)

In the matter of

WAYNE UNITED GAS COMPANY,
DEBTOR.

In Bankruptcy No. 3187.

Now comes the above entitled Wayne United Gas Company, a corporation, the petitioner herein, hereinafter, at times, referred to as the "debtor," by Fred O. Blue and T. Brooke Price, its attorneys, and files this, its Assignment of Errors in connection with its petition praying that the order or decree entered by the District Court of the United States for the Southern District of West Virginia in the above styled proceedings, on the 2nd day of March, 1936, be set aside, vacated and annulled, and that the said debtor be granted and awarded a rehearing, or review, of all matters arising in the above styled proceedings; because of the errors as set forth in this, the Assignment of Errors, and, upon a rehearing, that an order be entered by said District Court granting and awarding to the debtor, the relief prayed for in its Original and Amended and Supplemental petitions; and says that the decree made and entered herein on the said 2nd day of March, 1936, is erroneous, and in respect thereof assigns errors as follows:

I

The Court erred in finding and holding in effect that a plan of reorganization for a debtor corporation under Section 77B of the Bankruptcy Act, which provides for making up all payments in arrears and curing all defaults under the first mortgage on the property of the debtor, setting aside the acceleration of maturity of the first mortgage bonds by reason of such defaults, and remitting the first mortgage bondholders to their former (17) position, without change, (except that the former position of the first mortgage bondholders will be made

better in this—that the provisions of the Sinking Fund for the retirement of the first mortgage bonds will, under the plan, automatically become more favorable to the first mortgage bondholders), is not feasible and does not comply with the provisions of Section 77B, unless such plan has been accepted by the holders of two-thirds in amount of the first mortgage bonds.

II

The Court erred in finding and holding in effect that a plan of reorganization for a debtor corporation under Section 77B of the Bankruptcy Act, which provides for making up all payments in arrears and curing all defaults under the first mortgage on the property of the debtor, setting aside the acceleration of maturity of the first mortgage bonds by reason of such defaults, and remitting the first mortgage bondholders to their former position, without change, (except that the former position of the first mortgage bondholders will be made better in this—that the provisions of the Sinking Fund for the retirement of the first mortgage bonds will, under the plan, automatically become more favorable to the first mortgage bondholders), does not provide adequate protection for the realization by the first mortgage bondholders of the value of their interests, claims, or liens, as required by subdivision (b) of clause (5) of said section of the Bankruptcy Act.

III

The Court erred in finding and holding in effect that the claims and interests of the first mortgage bondholders are affected materially and adversely, within the contemplation of the provisions of Section 77B of the Bankruptcy Act, by reason of a plan of reorganization for a debtor corporation, under said section, which pro-
(18) vides for making up all payments in arrears and curing all defaults under the first mortgage on the property of the debtor, setting aside the acceleration of maturity of the first mortgage bonds by reason of such defaults, and remitting the first mortgage bondholders to their former position, without change, except that the

former position of the first mortgage bondholders will be made better in this—that the provisions of the Sinking Fund for the retirement of the first mortgage bonds will, under the plan, automatically become more favorable to the first mortgage bondholders.

IV

The Court erred in finding and holding that the original petition and the amended and supplemental petition of the debtor were not filed in good faith within the meaning of the Bankruptcy Act.

V

The Court erred in disapproving and rejecting the plan of reorganization outlined in the Original Petition and the Amended and Supplemental Petition of the Debtor, without affording the debtor an opportunity, in due course and at the proper time, to submit its complete plan and without according a hearing upon the plan so submitted, as contemplated by the provisions of Section 77B of the Bankruptcy Act.

VI

The Court erred in finding and holding that the Original Petition and the Amended and Supplemental Petition of the debtor and the plan of reorganization set out and described therein do not adequately or fairly provide for the protection of the rights and interests of the holders of the first mortgage bonds of the debtor, as required by law, or for the realization by them of the value of their interests or liens.

VII

The Court erred in finding and holding that the original petition and the amended and supplemental petition (19) of the debtor do not comply with the provisions of Section 77B of the Bankruptcy Act.

VIII

The Court erred in sustaining the motion of Owens-

Illinois Glass Company and Libbey-Owens-Ford Glass Company to dismiss the Original Petition and the Amended and Supplemental Petition filed herein by the debtor, and in dismissing said Petitions, without first giving to the debtor a day wherein it would have leave to further amend its said petitions and the proposed general plan, or to propose another plan.

IX

The Court erred in finding and holding that the said Original Petition and Amended and Supplemental Petition of the debtor do not present a feasible method of reorganizing the debtor corporation.

X

The Court erred in denying and overruling the motion of the said debtor for the approval of its Original Petition and Amended and Supplemental Petition as properly filed under the provisions of Section 77B of the Bankruptcy Act.

WHEREFORE, the said debtor corporation, petitioner herein, prays that the said order or decree entered by the said District Court in the above styled proceedings, on the 2nd day of March, 1936, be set aside, vacated and annulled, and that the said debtor be granted and awarded a rehearing, or review, of all matters arising in the above styled proceedings, and, upon a rehearing or review, that an order be entered by the said District Court granting and awarding to the debtor, the said Wayne United Gas Company, the relief prayed for in its Original and Amended and Supplemental Petitions (20) filed under Section 77B of the Bankruptcy Act.

FRED O. BLUE,
T. BROOKE PRICE,
Attorneys for Wayne United Gas Company, the debtor.

BLUE, DAYTON & CAMPBELL,
PRICE, SMITH & SPILMAN,
Of Counsel for the debtor.

(And on another day, to-wit: At a District Court of (21) the United States for the Southern District of West Virginia, at Charleston, in said District, on May 12, 1936).

ORDER

IN THE MATTER OF

WAYNE UNITED GAS COMPANY,
DEBTOR.

No. 3187—In Bankruptcy.

The Court having maturely considered the petition of the Wayne United Gas Company, the above named Debtor, filed herein on the 24th day of April, 1936, and the prayer thereof; the joint and several objections of Owens-Illinois Glass Company, a corporation, Libbey-Owens-Ford Glass Company, a corporation, The Chase National Bank, Trustee, and Paul C. Beardslee, Trustee, to the filing of said petition; and the motion of the said Wayne United Gas Company, the above named Debtor, made on the aforesaid day, for the relief prayed for in said petition; and the resistance of said motion by the aforesaid Owens-Illinois Glass Company, Libbey-Owens-Ford Glass Company, The Chase National Bank, Trustee, and Paul C. Beardslee, Trustee, is of the opinion that said petition of Wayne United Gas Company, the above named Debtor, is in proper form and substance and that the same and the aforesaid motion have been properly and seasonably presented in this cause, and that no rights have become vested under said order or decree entered herein on March 2, 1936, which will be disturbed by the vacation of said order or decree; and the Court is further of the opinion that good cause exists justifying this court in the exercise of a sound judicial discretion in setting aside, vacating, and annulling the aforesaid order or decree entered by this Court in the above styled proceeding on the 2nd day of March, 1936, and in granting to the said Wayne United Gas Company, the above named Debtor, a rehearing of all of the issues

and matters arising in the above styled proceeding upon the alleged errors set forth in the Assignment of Errors presented with the aforesaid petition, and upon the record in this proceeding.

It is, therefore, adjudged, ordered and decreed, that (22) said order or decree entered by this Court in the above styled proceeding on the 2nd day of March, 1936, be, and the same hereby is, set aside, vacated, annulled, and made of no effect, and that a rehearing or a review of all matters arising in the above styled proceeding be, and the same hereby is, granted and awarded to the said petitioner.

It is further adjudged, ordered and decreed that further hearing in the above styled proceeding, on all questions arising on the record, be had at ten o'clock in the forenoon, on the 22nd day of May, 1936, at Charleston, West Virginia.

To the foregoing action of the Court the said Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, and said The Chase National Bank, Trustee, and Paul C. Beardslee, Trustee, here object and except. And upon their motion, the Court doth now find and certify of record that pursuant to law a regular term of this Court began at Charleston, West Virginia, on the 21st day of April, 1936.

(And on another day, to-wit: At a District Court of (23) the United States for the Southern District of West Virginia, at Charleston, in said District, on May 28, 1936.)

DECREE

In the Matter of

WAYNE UNITED GAS COMPANY,
Debtor.

In Bankruptcy. No. 3187.

On the 22d day of May, 1936, came the Debtor, by Blue,

Dayton & Campbell and Price, Smith & Spilman, its attorneys, the Owens-Illinois Glass Company and Libbey-Owens Ford Glass Company, by W. James MacIntosh and Rummel, Blagg & Stone, their attorneys, and the Chase National Bank of the City of New York, a corporation, and Paul C. Beardslee, Trustees, by Brown, Jackson & Knight and Milbank, Tweed, Hope & Webb, their attorneys; and thereupon this cause came on for further hearing and for a rehearing of all matters arising in this proceeding, pursuant to the petition and motion of the Debtor filed herein on April 24, 1936, and to the order entered herein on the 12th day of May, 1936, granting the rehearing and review prayed for as aforesaid and setting said cause down for hearing at this time.

And thereupon the said Debtor, Wayne United Gas Company, tendered and asked leave to file herein its second amended and supplemental petition, to the filing of which said Glass Companies and the above named Trustees objected, but the Court overruled said objections and doth now adjudge, order and decree that said second amended and supplemental petition be filed herein, to which action the said Glass Companies and the said Trustees except. And the said Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company and the said Chase National Bank of the City of New York, a corporation, and Paul C. Beardslee, Trustees, by counsel, without waiving their objections to the jurisdiction of this Court to consider the matters set out in the Debtor's said petition and motion for rehearing filed (24) herein on April 24, 1936, or the matters set out in its original petition, amended and supplemental petition, or second amended and supplemental petition aforesaid, now ask that their several objections, protests, motions, and answers heretofore filed to the original petition and to the amended and supplemental petition of the Debtor herein be filed, taken and treated as like objections, protests, motions, and answers to the said second amended and supplemental petition this day filed, which is accordingly done; but the Debtor objected to the consideration by the Court of the several exhibits referred to in said written objections and motions of the Glass Companies, and in the stipulation, other than the

printed copies of the Indenture of Mortgage and the General Mortgage, at this time, or at any time before a day to be set by the Court for a hearing upon the plan to be submitted by the Debtor, the Debtor moving the Court to set a day for such hearing, which objection the Court overruled, and to which action of the Court the said Debtor excepted.

And thereupon the Debtor, by counsel, moved the Court to approve its said original petition, its amended and supplemental petition, and its second amended and supplemental petition, and to find that the same are, and that each of them is, filed in good faith, and otherwise in compliance with the requirements of Section 77B of the Bankruptcy Act, and to set a day for a hearing upon the plan which the Debtor would then submit to the Court, being a plan of reorganization as set out, in substance, in the Debtor's said second amended and supplemental petition, with notice to all parties interested in such hearing of the time and place thereof, in such manner as the Court may provide, which motion the said Glass Companies and the said Trustees resisted, upon the several grounds set out in their said objections, motions to dismiss, and answers to said petitions, respectively. (25) And thereupon this cause was fully heard upon the said several petitions of the Debtor, the motion to approve the same, and the several objections, protests, motions to dismiss, and answers of the said Glass Companies and the above named Trustees, upon the several exhibits with all of said pleadings, the written stipulations made and filed herein, upon all the former proceedings had herein, and the arguments of counsel thereon.

Whereupon, the Court, having maturely considered the matters aforesaid, is of opinion, and doth accordingly find, as follows:

(1) That said original petition, amended and supplemental petition, and second amended and supplemental petition, do not comply with Section 77B of the Bankruptcy Act, in that they do not sufficiently show a need for reorganization of the Debtor, and in that the

proposed plans of reorganization set out therein do not comply with said Section 77B.

(2) That said petitions and each of them are not filed in good faith.

(3) That the Debtor's first mortgage indebtedness now amounts to approximately $1,900,000, that the same is all due and payable at this time and that a decree has been entered by the Circuit Court of Kanawha County for the payment thereof, which decree is in full force and effect, and that a decree for the sale of the property and assets of the Debtor subject to said first mortgage has likewise been entered by said Court, which has been affirmed by the Supreme Court of Appeals of West Virginia, and the foreclosure suit is now pending before said Circuit Court for the sole purpose of ascertaining whether or not a breach has been committed of a certain contract for the purchase of gas produced by the Debtor, and if there has been such breach, the damages due it by reason thereof, and thereupon said Circuit Court has been directed by said Supreme Court of Appeals to proceed (26) to execute such decree of sale.

(4) That neither the properties of the Debtor subject to said first mortgage, nor all its properties of every kind, are of sufficient value to pay off the indebtedness secured by said first mortgage, and that there is no immediate prospect of any enhancement in such value; and any prospect of earnings from other sources would be too uncertain and remote to afford protection to the first mortgage bondholders.

(5) That the securities of the Debtor, other than the first mortgage bonds, represent no equity or value in the mortgaged property to support such securities.

(6) That the first mortgage indenture does not make adequate or sufficient provision for the repayment or retirement of the bonds secured thereby at maturity, but makes provision for the application of the corpus of the mortgaged properties to the payment of obligations other than the first mortgage bonds.

(7) That the effect of any reorganization of the character proposed would be to reinstate and continue in effect the provisions of the first mortgage including those provisions which provide for the application of the corpus of the mortgaged property to purposes other than the payment of the first mortgage bonds, except to the extent that said provisions may be modified by such plan of reorganization.

(8) That said petitions are not filed in good faith or with any intention of providing for the payment of said first mortgage indebtedness according to the adjudicated right of its holders, and the necessary result of the approval of said petitions would be to hinder, delay and prevent the payment of said indebtedness, and to continue the control and management of the corporate affairs and business of the Debtor, in the hands of those whose securities represent no property value.

(9) That the several plans for the reorganization of
(27) the Debtor company, as set out in the respective petitions aforesaid,

(a) Do not comply with the provisions of Section 77B of the Bankruptcy Act, and do not present a feasible plan or method of reorganizing the Debtor corporation within the meaning of said Act;

(b) Do not provide adequate protection for the realization by the first mortgage bondholders of the Debtor of the value of their interest, claim and lien, as required by said Act;

(c) Would materially and adversely affect the rights, claims and interests of said first mortgage bondholders, within the meaning of the provisions of said Act, and that the holders of more than 92 per cent of the said first mortgage bonds have refused to approve or accept the same.

(10) That it is not shown, nor does it appear from the record, that any plan of reorganization could be proposed and made effective by the Debtor which would

adequately provide for the protection of the rights, interests, claims and liens of said first mortgage bondholders, or would be accepted by them, and which would otherwise comply with the provisions of said Section 77B of the Bankruptcy Act.

To the foregoing ten findings of law and fact, and to each of them, the Debtor, the Wayne United Gas Company, objected and excepted; and the said Debtor also further objected and excepted as to findings (3), (4), (5), (6), (7), (8), and (10), upon the ground, among others, that as to said findings (3), (4), (5), (6), (7), (8), and (10), the same are either findings of fact or findings of law and fact, before a hearing upon the plan which the Debtor would submit to the Court on a day to be set by the Court for that purpose, the setting of a day for such hearing having been moved for by the Debtor, (28) and, therefore, the Court should not, at this time, have made any findings of fact as to the matters set forth in (3), (4), (5), (6), (7), (8), and (10); and that said findings are not warranted by the record as presently constituted, nor proper at this state of the proceedings in this cause.

It is therefore adjudged, ordered and decreed that the Debtor's motion to approve its several petitions, and each of them and to find that the same are, and each of them is, filed in good faith, and that a day be set for a hearing upon the proposed plan which the Debtor would then submit to the Court, namely, a plan of reorganization as set out, in substance, in the Debtor's second amended and supplemental petition, be and the same is hereby overruled; and that the motions of the said Glass Companies and of the said Trustees to dismiss the Debtor's several petitions, and each of them, be and the same are hereby sustained. It is therefore further adjudged, ordered and decreed that said petitions of the Debtor and each of them be and the same are hereby disapproved, and that the same be dismissed; to which action of the Court, the Debtor, Wayne United Gas Company, objected and excepted.

It is further adjudged, ordered and decreed that the

Debtor, Wayne United Gas Company, do pay to the objectors, Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, and to said Chase National Bank of the City of New York and Paul C. Beardslee, Trustees, their costs about their defense to said petitions in this Court in this behalf expended. And nothing further remaining to be done herein, it is further ordered that this cause be retired from the docket.

And the Debtor, Wayne United Gas Company, indicating to the Court its desire and purpose to appeal from this order or decree to the United States Circuit Court of Appeals for the Fourth Circuit in the manner provided by law, it is further ordered that the effect of this
(29) decree be stayed for the period of thirty days from this date to enable the said Debtor to make such application.

(The Debtor's Second Amended and Supplemental Petition, referred to in the foregoing order, is in the words and figures as follows:)

DEBTOR'S SECOND AMENDED AND SUPPLEMENTAL PETITION UNDER SECTION 77B OF THE BANKRUPTCY ACT

(30) (Filed May 28, 1936).

IN RE: WAYNE UNITED GAS COMPANY,
A Debtor.

No. 3187—In Bankruptcy.

TO THE HONORABLE THE JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA:

The Second Amended and Supplemental Petition of WAYNE UNITED GAS COMPANY, a corporation under the laws of the State of West Virginia, with its principal office at The City of Charleston, Kanawha County, said State:

Prepaid rentals, insurance, etc.		845.72
Unamortized debt discount and expense		23,704.07
Total Assets		$3,229,745.01

(33) Liabilities

Capital Stock		
Issued and outstanding—250,000 shares		$250,000.00
Funded debt—		
First mortgage 6 1/2% bonds due June 1, 1944,	$1,464,000.00	
Five year 7% notes due June 1, 1934	*475,000.00	
*Secured by general mortgage 7% bonds due June 1, 1939, in equal amount		1,939,000.00
Current liabilities—		
Notes payable to Commonwealth Gas Corp.	$158,000.00	
Notes payable to others	58,792.71	
Accounts payable	3,446.65	
Interest payable on funded debt	492,238.33	
Interest payable on notes payable	60,341.96	772,819.65
Accrued liabilities—		
Taxes accrued	5,044.78	
Other accrued liabilities	1,415.32	6,460.10
Reserve for depreciation and depletion		454,049.76
Capital surplus		320,758.00
Earned surplus (deficit)		513,342.50
Total liabilities		$3,229,745.01

"'NOTE: The foregoing balance sheet does not reflect claim against purchasers of gas by reason of their failure to take the same in quantities as provided in contract dated June 5, 1929.

"'4. Equity receivership proceedings are pending against the Debtor, as follows:

(a) Proceedings in equity in the Circuit Court of Kanawha County, West Virginia, wherein John B. Bell et al are plaintiffs and Wayne United Gas Company and others are defendants, and in which case the said Circuit Court of Kanawha County, by decrees pronounced therein on the 21st day of June, 1932, and the 15th day of July, 1932, appointed Ross B. Thomas and Herman L. (34) Bennett as Receivers for the Debtor's properties situate in the State of West Virginia, and they are still acting as such and are in possession of Debtor's properties in West Virginia.

(b) Proceedings in equity in the Morgan Circuit Court of Morgan County, Kentucky, wherein the Chase National Bank of the City of New York and Paul C. Beardslee, Trustees, are plaintiffs, and the Wayne United Gas Company and others are defendants, in which case the said Morgan Circuit Court, by decree pronounced therein on the 18th day of October, 1932, appointed J. Henry Cole Receiver for the Debtor's properties situate in the State of Kentucky, and he is still acting as such and is in possession of Debtor's properties in Kentucky.

5. The Debtor is in need of relief under the provisions of Section 77B of the Bankruptcy Law of the United States for the following reasons: The earnings of the Debtor in recent years have been insufficient to enable it to meet the annual interest and sinking fund charges under its first mortgage bonds and under its general mortgage bonds. No interest has been paid upon such bonds since the 1st day of December, 1931. By reason of existing defaults, the trustees in the first lien deed of trust or mortgage have declared the principal amount of the bonds secured thereby to be now due and payable. The forced liquidation of the assets of the Debtor would result in the sacrifice of those assets to the great detriment of its creditors. The interest of the

Debtor and its creditors and stockholders will best be preserved by the continuance of its business as a going concern under a Plan of Reorganization which can be accomplished under the provisions of said Section 77B of the Bankruptcy Law of the United States.

6. The Debtor, is unable to meet its debts as they mature and upon information and belief the value attributed to the assets of the Debtor on its books as set (35) forth in the foregoing statement of assets and liabilities is greatly in excess of the present fair value of such assets and that the Debtor is insolvent, in the sense that it is unable to meet its debts as they mature.

7. Your Petitioner, the Debtor, proposes that it shall effect a reorganization under said Section 77B of the Bankruptcy Law.

8. There is attached hereto, marked 'Exhibit A', a certified copy of the resolutions passed by the board of directors of Debtor at a meeting thereof duly called, convened and held on the 28th day of October, 1935, authorizing the filing of this petition.

WHEREFORE the Debtor prays:

(a) That this Court find that this petition complies with Section 77B of the Bankruptcy Act of the United States, and that it has been filed in good faith, and that this Court approve the same as properly filed under said section of said act.

(b) That this Court, upon such approval of this petition and after hearing upon notice to such others, if any, as the Judge of this Court may determine, appoint a Trustee or Trustees of the Debtor's estate, with authority to operate the business of the Debtor subject to the supervision and control of this Court, fix the amount of the bond, prescribe the powers and duties of the trustee or trustees, and require the trustee or trustees to give any and all notices to creditors and stockholders, and cause the publication thereof to be made in such manner as the Court shall direct, or as required by law, of the time and place of any hearing ordered upon this petition.

(c) That upon such approval of this petition this Court enjoin and stay the commencement or continuation (36) of suits against the Debtor until after the final decree entered in this cause.

(d) That upon such approval of this petition this Court direct Ross B. Thomas and Herman L. Bennett, as Receivers of the Debtor appointed by the Circuit Court of Kanawha County, West Virginia, and J. Henry Cole, as Receiver of the Debtor appointed by the Morgan Circuit Court, Morgan County, Kentucky, to deliver to the trustee or trustees appointed by this Court, all properties and assets now in the possession or under the control of said Receivers, subject to such provisions as this Court may deem equitable for the protection of obligations incurred by such Receivers and for the payment of their reasonable administrative expenses or allowances.

(e) That your Petitioner be granted all such other and further relief to which it may be entitled."

And now, by way of an amended and supplemental petition, the Debtor further represents:

9. That it hereby adopts and makes as part hereof its said original petition as above quoted and set forth.

10. In respect of the sinking fund and interest payments accrued and unpaid on the First Mortgage 6.50% Sinking Fund Convertible Gold Bonds due June 1, 1944, secured by an Indenture of Mortgage, dated as of the 1st day of June, 1929, (the same being the first lien deed of trust or mortgage referred to in paragraph 5), and the funds in the hands of Ross B. Thomas and Herman L. Bennett, Special Receivers, (appointed pursuant to decree of the Circuit Court of Kanawha County, West Virginia), available for the payment of the sinking fund requirements and interest, exclusive of reasonable allowances to the Special Receivers mentioned and referred to in paragraph 4 hereof and to their attorneys, and to the trustees in the said first lien deed of trust or mortgage and their attorneys, the same are as follows:

"Sinking Fund requirements are $2,000 per month due
(37) 26th of each month.

Sinking Fund requirements have been met to May 26, 1932.

Sinking Fund Requirements (in default)	
June 26, 1932, to December 26, 1932—7 months @ $2,000	$14,000.00
Jan. 26, 1933, to December 26, 1933—12 months @ $2,000	24,000.00
Jan. 26, 1934, to December 26, 1934—12 months @ $2,000	24,000.00
Jan. 26, 1935, to November 26, 1935—11 months @ $2,000	22,000.00
Total	84,000.00
Interest has been paid to December 1, 1931, on $1,464,000 principal amount of First Mortgage 6 1/2% Bonds outstanding	
Interest Requirements (in default) 6 1/2% interest on $1,464,000, amounts to $7,930 per month.	
December 1, 1931, to November 30, 1935, or 48 months @ $7,930	380,640.00
Total requirements for interest and sinking funds to December 1, 1935,	464,640.00
Estimated amount of accounts payable at December 1, 1935	3,500.00
Total of above liabilities and requirements	468,140.00

Funds available in the hands of Ross B. Thomas and Herman L. Bennett, Special Receivers, at December 1, 1935, to discharge liabilities, exclusive of reasonable allowances to the Special Receivers and their attorneys,

and the Trustees in the first lien deed of trust or mortgage and their attorneys;

Cash in banks	$450,462.85	
Accounts receivable for November gas sales	14,509.05	
Total funds available, exclusive of the above referred to reasonable allowances		464,971.90

11. The Debtor, as Seller, some years heretofore, entered into a written agreement with the Owens-Illinois Glass Company and the Libbey Owens Sheet Glass Company, corporations, (the name of the latter corporation by change in name being now Libbey-Owens-Ford Glass Company) as Buyers, said agreement being dated the (38) 5th day of June, 1929, and whereby the Debtor, as Seller, agreed to deliver from the gas wells drilled and to be drilled on its properties described in the agreement (being the properties of the Debtor situate in the Southern District of West Virginia), and said Glass Companies, the Buyers, agreed to take and/or pay for at least five million cubic feet of gas each day during the term of the agreement, to the extent of the Debtor's capacity to furnish said amount from said premises, with provisions that the Buyers would, under the conditions as set forth in said agreement, take an additional amount of One Million cubic feet of gas each day during the term of the agreement, and with the further provision, under the conditions as set forth in the agreement, that the Debtor, as Seller, should have the right to deliver gas obtained from other sources to make up any deficiency in the respective amounts to be delivered under the agreement: That the prices to be paid for the gas delivered under such agreement were and are as follows—namely—12¢ per 1,000 cubic feet for the calendar year 1930, 13¢ for the calendar year 1931, 14¢ for the calendar year 1932, and 15¢ thereafter throughout the remainder of the term of the agreement. Debtor is advised, and so believes, that said agreement is very valuable and is one of its assets of great value.

12. The Debtor was, by the terms of said agreement,

required to promptly begin development of the premises described in said agreement and to drill the large number of wells as specified and set forth therein; and that, pursuant thereto, Debtor did promptly begin the drilling and continued the drilling, of wells on the premises until May, 1932, when, at the request of the Glass Companies, it suspended further drilling. The Debtor expended for the drilling of such wells and for gathering and transmission lines, pursuant to the requirements of the said (39) agreement, the sum of $445,180.74. No wells have been drilled on the Debtor's properties in the Southern District of West Virginia since the appointment of Ross B. Thomas and Herman L. Bennett, Special Receivers.

13. The Debtor is advised and believes that the said Glass Companies breached said agreement of June 5, 1929, in this, that they failed to take and/or pay for the quantities of gas which they were required to take or pay for under said agreement of June 5, 1929, and by reason of such breach that said Glass Companies are indebted to the Debtor in a large sum of money, the amount whereof has not been determined; and that the question of such breach and the amount of the damages by reason thereof has been raised in said suit in equity in the Circuit Court of Kanawha County, West Virginia, wherein John B. Bell et al, are plaintiffs, and Wayne United Gas Company et als. are defendants, and which question remains undetermined.

14. Upon and following the appointment of Ross B. Thomas and Herman L. Bennett, Special Receivers, by the Circuit Court of Kanawha County, West Virginia, said Receivers continued to deliver, and are now delivering, natural gas to the two Glass Companies produced on Debtor's properties in the Southern District of West Virginia, under the agreement of June 5, 1929, and have collected from the Glass Companies the prices for such gas as provided for in the said agreement, so that there is now in the hands of said Special Receivers the sum of $450,462.85, all of which has come into the hands of said Special Receivers from the sale of such gas under said agreement since their appointment, except the sum of $9.421.73, (which last sum came into the hands of said Special Receivers at the time of their appointment by the Circuit Court of Kanawha County, West Vir-

ginia, as part of the assets of the Debtor), leaving a net amount, in cash, of $441,041.12 which has come into (40) the hands of the said Special Receivers from such sales, and the account receivable of $14,509.05 for gas delivered to the Glass Companies under the said agreement in the month of November, 1935, so that the earnings which have come into the hands of the Receivers, since their appointment, from sales of gas from Debtor's said properties, aggregate in cash and account receivable $455,550.17, and out of which there is payable, as of December 1, 1935, an estimated amount of accounts payable in the sum of $3,500.00, leaving a net amount in cash and account receivable of $452,050.17.

"The Special Receivers have paid all of their operating expenses, including expenses for management contract, (except an estimated amount of accounts payable as of December 1, 1935, of $3,500.00), as well as all taxes now due, except $226.74 payable on the Debtor's properties in the State of Kentucky.

15. The sinking fund requirements under the first lien deed of trust or mortgage and the interest on the bonds secured thereby for the period from the 1st day of June, 1932, to November 30, 1935, aggregate the sum of $417,160.00.

16. The Debtor's properties in the Southern District of West Virginia have not been fully developed by the drilling of necessary wells thereon for such development, so that, for the further and proper development of said properties, a number of additional wells should be drilled thereon: That upon the drilling of such wells the quantities of gas which can be delivered to the Glass Companies from the Debtor's said properties can, and will, be greatly increased, with correspondingly increased income therefrom.

17. The Debtor has negotiations under way for the purchase of additional gas, with satisfactory assurances (41) that the same will be concluded, upon the approval of a Plan of Reorganization, so that Debtor will be in position to, can, and will purchase large quantities of gas, in quantities sufficient to make up any deficiency under the terms of the agreement of June 5, 1929, at a

price which will enable the Debtor to make a fair profit thereon.

18. The Debtor is advised, and so believes, that it can, and will, upon reorganization along the lines of the proposed Plan, hereinafter set forth in substance, in paragraph 19 hereof, earn sufficient moneys from the sale of natural gas under the agreement of June 5, 1929, to fully pay the first lien deed of trust or mortgage bonds and all of its other creditors, and also earn sufficient moneys to cause its stock to have considerable value.

19. Debtor will promptly, and within any reasonable time fixed by the Court, propose a Plan of Reorganization which will be in substance as follows:

(a) The properties of Debtor will be retained by it, or transferred to a new Company, as the case may be, subject to the lien of the Indenture of Mortgage now securing the First Mortgage 6.50 Per Cent Sinking Fund Convertible Gold Bonds of Debtor, and each and every provision of said Indenture of Mortgage, and the lien thereof, shall be and remain in full force and effect.

All arrears of sinking fund under said Indenture, and all arrears of interest, on the $1,464,000 principal amount of bonds now outstanding thereunder, which shall have accrued up to the time of the consummation of the Plan, will be paid in full in cash upon the consummation thereof, and at that time the full amount applicable to the arrears of sinking fund under said Indenture will be used to redeem bonds then outstanding, at the redemption price provided in said Indenture, thereby immediately (42) reducing the principal amount of bonds outstanding thereunder;

(b) As a part of the Plan, Debtor will agree to furnish or cause to be furnished, at the time of the consummation of the Plan, an amount of cash which, together with the funds available in the hands of the Trustees, will be sufficient to pay

(1) All arrears of sinking fund and interest referred to in sub-paragraph (a) above;

(2) All taxes due and unpaid;

(3) All amounts, if any, secured by specific liens on any Debtor's property, other than amounts secured by the lien of the First Mortgage, the lien of the General Mortgage, and the indirect lien of the Five Year 7% gold notes;

(4) All fees and expenses which may be allowed by the proper court to Receivers and their counsel, Mortgage Trustees and their counsel, Trustees in Bankruptcy and their counsel, and others, if any, either on account of the equity receivership proceedings hereinbefore referred to, or on account of these proceedings;

(5) All other costs of reorganization which may be allowed by this court; and,

(6) Such amount as the court shall deem necessary for working capital for the reorganized company.

"In order to provide the necessary amount of cash for all of the above purposes, Debtor will, within any reasonable time fixed by the court, furnish a commitment to that effect, satisfactory to the court, and will deposit or cause to be deposited in escrow such amount of cash or United States Government obligations as shall be required by the court, as a guarantee that such commitment will be carried out.

The maker of such commitment will receive an unsecured six per cent note of the reorganized company, for all money furnished under such commitment, which note (43) shall be subordinate to the lien of First Mortgage. The interest on such note shall be payable semiannually and the principal shall be payable over a period of five (5) years in such installments as the court shall approve when the Plan is consummated;

(c) The principal of the General Mortgage 7% Gold Bonds of Debtor, and all sinking fund payments, applicable thereto, and all interest on such Bonds, which shall be due and unpaid at the time the Plan is consummated, shall be forever waived and said Bonds, sinking fund payments and interest shall be cancelled, and no obliga-

tions of any character shall be issued in exchange therefor, and the Indenture securing such General Mortgage 7% Gold Bonds shall be cancelled and released.

All other money obligations of the Debtor, which are junior to the First Mortgage 6.50 Per Cent Sinking Fund Convertible Gold Bonds, and which are not to be paid in cash pursuant to sub-paragraph (b) hereof, whether represented by the Five Year 7% notes, or other notes, or by accounts payable of Debtor, will be cancelled, and surrendered in exchange for Income Debentures or Notes of the reorganized company in amounts equal to the principal amounts of the obligations so cancelled and surrendered. Sinking fund payments in default under the agreement securing the Five Year 7% Notes, and interest in default on all money obligations of Debtor so cancelled and surrendered shall be forever waived and cancelled and no obligations of any character shall be issued in exchange therefor.

The Income Debentures or Notes, to be issued as aforesaid, shall have a maturity date subsequent to the maturity date of the First Mortgage 6.50 Per Cent Sinking Fund Convertible Gold Bonds; there shall be no sinking fund for the retirement of such Income Debentures or Notes; and interest thereon shall not exceed six per cent per annum, shall be non-cumulative and shall be (44) payable only to the extent, if any, that for any year there shall be net earnings available after payment of all operating expenses, maintenance and taxes, and after payment or allowance in full for such year of all sinking fund payments and interest on the First Mortgage 6.50 Per Cent Sinking Fund Convertible Gold Bonds, and all installments of principal and interest on the note given to the maker of the commitment referred to in sub-paragraph (b) hereof;

(d) Twenty-five Per Cent (25%) of the capital stock of the reorganized company (which shall be all common stock) will be issued to the person making the commitment referred to in sub-paragraph (b) hereof, and the other seventy-five per cent (75%) will be issued pro rata to the present stockholders of Debtor in exchange for their present certificates of stock;

(e) The Plan shall be subject to amendment by court

order at any time, and the method of consummation shall be under complete control of the court. The Plan shall be consummated as soon as possible, and the court shall, if it sees fit, retain jurisdiction of all parties to the proceedings after the consummation thereof, for the protection, to the extent necessary, of all parties concerned;

(f) All right of action for breach of Debtor's gas sale agreement, dated June 5, 1929, against the buyers thereunder (who now own in excess of 90% of Debtor's First Mortgage 6.50 Per Cent Sinking Fund Convertible Gold Bonds) shall be preserved;

(g) Debtor will furnish or cause to be furnished, when the Plan is proposed and submitted, written acceptance of the Plan by at least 66 2/3% in amount of claims of creditors of Debtor of each class, except creditors whose claims will be paid in cash as above provided, and except holders of First Mortgage 6.50 Per Cent Sinking Fund Gold Bonds (whose rights are either not affected by the Plan or are fully protected in accord-
(45) ance with the provisions of Section 77B), and written acceptance thereof by stockholders of Debtor owning 51% of its outstanding stock.

20. There is attached hereto, marked "Exhibit B", a certified copy of the resolutions passed by the Board of Directors of Debtor at a meeting thereof duly called, convened and held on the 9th day of December, 1935, authorizing the filing of this amended and supplemental petition.

WHEREFORE the Debtor prays:

(a) That this Court find that the original petition and this amended and supplemental petition comply with Section 77B of the Bankruptcy Act of the United States, and that the same have been filed in good faith, and that this Court approve the same as properly filed under said section of said Act.

(b) That this Court, upon such approval of said petitions and after hearing upon notice to such others, if any, as the Judge of this Court may determine, appoint a Trustee or Trustees of the Debtor's estate, with au-

thority to operate the business of the Debtor subject to the supervision and control of this Court, fix the amount of the bond, prescribe the powers and duties of the trustee or trustees, and require the trustee or trustees to give any and all notices to creditors and stockholders, and cause the publication thereof to be made in such manner as the Court shall direct, or as required by law, of the time and place of any hearing ordered upon this petition.

(c) That upon such approval of the original petition and this amended and supplemental petition this Court enjoin and stay the commencement or continuation of suits against the Debtor until after the final decree entered in this cause.

(d) That upon such approval of said petitions this Court direct Ross B. Thomas and Herman L. Bennett, as Receivers of the Debtor appointed by the Circuit Court of Kanawha County, West Virginia, and J. Henry Cole, as Receiver of the Debtor appointed by the Morgan (46) Circuit Court, Morgan County, Kentucky, to deliver to the trustee or trustees appointed by this Court, all properties and assets now in the possession or under the control of said Receivers, subject to such provisions as this Court may deem equitable for the protection of obligations incurred by such Receivers and for the payment of their reasonable administrative expenses or allowances.

(e) That your petitioner be granted all such other and further relief to which it may be entitled.

"WAYNE UNITED GAS COMPANY,
"By (Sgd) N. RAY NOFFSINGER,
Its President."

(Sgd) BLUE, DAYTON & CAMPBELL,
(Sgd) PRICE, SMITH & SPILMAN,
Attorneys.

And now, by way of second amended and supplemental petition, the Debtor further represents:

21. That it hereby adopts and makes as part hereof, its said original petition and its said amended and supplemental petition, as above quoted and set forth.

22. That in respect of cash requirements and available funds estimated as at May 31, 1936, the same may be summarized and stated as follows:

Cash requirements		
Accrued interest unpaid on First Mortgage Bonds—December 1, 1931, to May 31, 1936, 54 months @ $7,930 per month		$428,220.00
Sinking Fund requirements of First Mortgage Bonds—May 26, 1932, to May 26, 1936, 48 months @ $2,000 per month		96,000.00
Estimated cash requirements for operating expenses applicable to:		
Month of April (paid in May)	$2,840.00	
Month of May (estimated)	4,140.00	6,980.00
Total Requirements		$531,200.00
(47)		
Cash or equivalent available		
Cash in bank May 1, 1936, in hands of Special Receivers.		
Checking account	401,092.52	
Time deposit	101,277.80	502,370.32
Collections to be made after 5/1/36		
For April gas sales—5/15/36	14,183.40	
Material sold—second hand	932.54	
Return premium—insurance	97.94	
Interest on time deposit for May	85.90	
For May gas sales	14,500.00	
		29,799.78
Total cash and receivable applicable to business done prior to 5/31/36		532,170.10
Excess of available funds over requirements to May 31, 1936		970.10

23. Debtor will promptly, and within any reasonable time fixed by the Court, propose a Plan of Reorganization which will be in substance as follows:

(a) The properties of Debtor will be retained by it, or transferred to a new company, as the case may be, subject to the lien of the Indenture of Mortgage now securing the First Mortgage 6.50 Per Cent Sinking Fund Convertible Gold Bonds of Debtor, and each and every provision of said Indenture of Mortgage, and the lien thereof, shall be and remain in full force and effect, except that the cumulative feature of the provision of the Indenture allowing for the deduction of certain amounts each year for capital expenditures will be waived by the Debtor for the benefit of the First Mortgage 6.50 Per Cent Sinking Fund Convertible Gold Bonds, so that the unused allowance for any year shall be cancelled and not deducted in figuring the 60% of available earnings which constitute the additional sinking fund for said Bonds.

All arrears of sinking fund under said Indenture, and all arrears of interest, on the $1,464,000 principal amount of bonds now outstanding thereunder, which shall have accrued up to the time of the consummation of the Plan, (48) will be paid in full in cash upon the consummation thereof, and at that time the full amount applicable to the arrears of sinking fund under said Indenture will be used to redeem bonds then outstanding, at the redemption price provided in said Indenture, thereby immediately reducing the principal amount of bonds outstanding thereunder;

(b) As a part of the Plan, Debtor will agree to furnish or cause to be furnished, at the time of the consummation of the Plan, an amount of cash which, together with the funds available in the hands of the Trustees, will be sufficient to pay

(1) All arrears of sinking fund and interest referred to in sub-paragraph (a) above;

(2) All taxes due and unpaid;

(3) All amounts, if any, secured by specific liens on any of Debtor's property, other than amounts secured

by the lien of the First Mortgage, the lien of the General Mortgage, and the indirect lien of the Five Year 7% Gold Notes;

(4) All fees and expenses which may be allowed by the proper court to Receivers and their counsel, Mortgage Trustees and their counsel, Trustees in Bankruptcy and their counsel, and others, if any, either on account of the equity receivership proceedings hereinbefore referred to, or on account of these proceedings;

(5) All other costs of reorganization which may be allowed by this Court; and

(6) Such amount as the Court shall deem necessary for working capital for the reorganized company.

In order to provide the necessary amount of cash for all of the above purposes, Debtor will, within any reasonable time fixed by the court, furnish a commitment to that effect, satisfactory to the court, and will deposit or cause to be deposited in escrow such amount of cash or (49) United States Government obligations as shall be required by the court, as a guarantee that such commitment will be carried out.

The maker of such commitment will receive an unsecured six per cent note of the reorganized company, for all money furnished under such commitment, which note shall be subordinate to the lien of First Mortgage. The interest on such note shall be payable semi-annually out of the allowance for interest on Debtor's outstanding obligations provided in the Indenture securing the First Mortgage 6.50 Per Cent Sinking Fund Convertible Gold Bonds, but only after provision for the payment of the interest on the first mortgage bonds and the payment of the monthly amounts as required by sub-paragraph (a) of Section 3.01 of said Indenture have been made, and the payment of such interest out of said allowance shall be non-cumulative. The principal of such note shall be payable out of the allowance for payment or reduction of principal of Debtor's outstanding indebtedness provided in said Indenture, to the extent of such allowance, and the balance only out of 40% of the "available earnings", as defined in said Indenture, after application of 60% thereof to the sinking fund on said bonds,

but only after provision for the payment of the interest on the first mortgage bonds and the payment of the monthly amounts as required by sub-paragraph (a) of Section 3.01 of said Indenture have been made, and such payments out of said allowance shall be non-cumulative, and the cumulative feature of the provision of the Indenture allowing for the deduction of certain amounts each year for the payment or reduction of principal of its outstanding unsecured indebtedness, in determining the available net earnings, is hereby waived and cancelled. Such payments shall be made from time to time as funds shall be available therefor, until the principal of such note shall have been fully paid.

(c) The principal of the General Mortgage 7% Gold (50) Bonds of Debtor, and all sinking fund payments, applicable thereto, and all interest on such Bonds, which shall be due and unpaid at the time the Plan is consummated, shall be forever waived and said Bonds, sinking fund payments and interest shall be cancelled, and no obligations of any character shall be issued in exchange therefor, and the Indenture securing such General Mortgage 7% Gold Bonds shall be cancelled and released.

All other money obligations of the Debtor, which are junior to the First Mortgage 6.50 Per Cent Sinking Fund Convertible Gold Bonds, and which are not to be paid in cash pursuant to sub-paragraph (b) hereof, whether represented by the Five Year 7% Notes, or other notes, or by accounts payable of Debtor, will be cancelled and surrendered in exchange for Income Debentures or Notes of the reorganized Company in amounts equal to the principal amounts of the obligations so cancelled and surrendered. Sinking fund payments in default under the agreement securing the Five Year 7% Notes, and interest in default on all money obligations of Debtor so cancelled and surrendered shall be forever waived and cancelled and no obligations of any character shall be issued in exchange therefor.

The Income Debentures or Notes, to be issued as aforesaid, shall have a maturity date subsequent to the maturity date of the First Mortgage 6.50 Per Cent Sinking Fund Convertible Gold Bonds; there shall be no sinking fund for the retirement of such Income Debentures or Notes; and interest thereon shall not exceed six per

cent per annum, shall be noncumulative and shall be payable only as authorized by the Board of Directors out of 40% of the "available earnings" for any year as defined in the Indenture, after application of 60% of such available earnings to the sinking fund on the First Mortgage 6.50 Per Cent Sinking Fund Convertible Gold Bonds.

(d) Twenty-five Per Cent (25%) of the capital stock of the reorganized company (which shall be all common stock) will be issued to the person making the commitment referred to in sub-paragraph (b) hereof, and the other seventy-five per cent (75%) will be issued pro rata (51) to the present stockholders of Debtor in exchange for their present certificates of stock;

(e) The Plan shall be subject to amendment by court order at any time, and the method of consummation shall be under complete control of the court. The plan shall be consummated as soon as possible, and the court shall, if it sees fit, retain jurisdiction of all parties to the proceedings, after the consummation thereof, for the protection, to the extent necessary, of all parties concerned;

(f) All rights of action for breach of Debtor's gas sale agreement, dated June 5, 1929, against the buyers thereunder (who now own in excess of 90% of Debtor's First Mortgage 6.50 Per cent Sinking Fund Convertible Gold Bonds) shall be preserved.

24. There is attached hereto, marked "Exhibit C" a certified copy of the resolutions passed by the Board of Directors of Debtor at a meeting thereof duly called, convened and held on the 18th day of May, 1936, authorizing the filing of this second amended and supplemental petition.

WHEREFORE the Debtor prays:

(a) That this Court find that the original petition, the amended and supplemental petition, and this second amended and supplemental petition comply with Section 77B of the Bankruptcy Act of the United States, and that the same have been filed in good faith, and that this Court approve the same as properly filed under said Section of said Act.

(b) That this Court, upon such approval of said petitions and after hearing upon notice to such others, if any, as the Judge of this Court may determine, appoint a Trustee or Trustees of the Debtor's estate, with authority to operate the business of the Debtor subject to the supervision and control of this Court, fix the amount of the bond, prescribe the powers and duties of the trustee or trustees, and require the trustee or trustees to give any and all notices to creditors and stockholders, and cause the publication thereof to be made in such manner as the Court shall direct, or as required by law, of (52) the time and place of any hearing ordered upon this petition.

(c) That upon such approval of the original petition, the amended and supplemental petition, and this second amended and supplemental petition this Court enjoin and stay the commencement or continuation of suits against the Debtor until after the final decree entered in this cause.

(d) That upon such approval of said petitions this Court direct Ross B. Thomas and Herman L. Bennett, as Receivers of the Debtor appointed by the Circuit Court of Kanawha County, West Virginia, and J. Henry Cole, as Receiver of the Debtor appointed by the Morgan Circuit Court, Morgan County, Kentucky, to deliver to the trustee or trustees appointed by this Court, all properties and assets now in the possession or under the control of said Receivers, subject to such provisions as this Court may deem equitable for the protection of obligations incurred by such Receivers and for the payment of their reasonable administrative expenses or allowances.

(e) That your Petitioner be granted all such other and further relief to which it may be entitled.

WAYNE UNITED GAS COMPANY
By N. R. NOFFSINGER
Its President.

BLUE, DAYTON & CAMPBELL,
PRICE, SMITH & SPILMAN;
Attorneys.

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, TO-WIT:

N. R. NOFFSINGER, (A Credible Person), being duly (53) sworn, says that he is the President of the Wayne United Gas Company, a corporation, the Debtor named in the foregoing second amended and supplemental petition, and that he has read said second amended and supplemental petition and that he knows the contents thereof; that the facts and allegations therein contained are true, except such as therein stated to be made upon information and belief, and that as to such allegations he believes them to be true; also, that said second amended and supplemental petition is filed in good faith.

N. R. NOFFSINGER

Taken, sworn to and subscribed before me, this 18th day of May, 1936.

My commission expires on the 16 day of August, 1937.

BLIGH SNODGRASS
Notary Public in and for
said County of Kanawha.

(seal)

EXHIBIT C WITH SECOND AMENDED AND SUPPLEMENTAL PETITION

CERTIFICATE

I, R. J. SKILLMAN, do hereby certify that I am a (54) duly elected, qualified and presently acting Assistant Secretary of Wayne United Gas Company, a West Virginia corporation, and that the following is a true copy of a resolution duly and regularly adopted by the Board of Directors of Wayne United Gas Company at a meeting thereof duly called, convened and held on the 18th day of May, 1936, and that said resolution has not been amended or rescinded:

"WHEREAS, this Company has heretofore filed a pe-

tition and an amended and supplemental petition for reorganization under Section 77B of the Federal Bankruptcy Statutes in the United States District Court for the Southern District of West Virginia; and

WHEREAS, counsel for the Company deem it advisable that a second amended and supplemental petition, in or substantially in the form before this meeting, be filed in said proceedings;

NOW, THEREFORE, BE IT RESOLVED, that this Company file in the District Court of the United States for the Southern District of West Virginia, under and pursuant to Section 77B of the Acts of Congress relating to Bankruptcy, and providing for corporate reorganization, a second amended and supplemental petition in, or substantially in, the form presented to this meeting, with such alterations or changes therein as counsel for this Company may approve, or as the President or Treasurer of this Company, or either of them, signing said Petition, shall by such signing approve, and that the President and Treasurer of this Company be and they are hereby, and each of them singly is authorized and directed in the name and on behalf of this Company to execute and file such second amended and supplemental petition forthwith."

IN WITNESS WHEREOF, I have hereunto signed *by* name and affixed the corporate seal of said Wayne United Gas Company, this 18th day of May, 1936.

R. J. SKILLMAN
Assistant Secretary of Wayne United Gas Company.

(corporate Seal)

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL

(55) (Filed June 11, 1936)

In the matter of

WAYNE UNITED GAS COMPANY
Debtor

In Bankruptcy—No. 3187

Now comes the Wayne United Gas Company, a corporation, the petitioner and Debtor in the above styled proceedings, hereinafter referred to as the "appellant," and files this its Assignment of Errors and Prayer for Reversal in connection with its petition for an appeal under Section 25(a) of the Bankruptcy Act from the decree made and entered in the above styled proceedings by the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia, on the 28th day of May, 1936, and says that said decree is erroneous, and in respect thereof assigns the following errors:

I

It was error to overrule appellant's objection to the consideration of the several exhibits referred to in the written objections and motions of Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, and in the stipulation, other than the printed copies of the Indenture of Mortgage and the General Mortgage, at the hearing on the 22nd day of May, 1936, or at any time before a day set for a hearing upon a plan to be submitted by the appellant.

II

It was error to overrule the appellant's motion made on the 22nd day of May, 1936, to approve its original

petition, its amended and supplemental petition, and its second amended and supplemental petition, and to find that the same were, and each of them was, filed in good faith, and otherwise in compliance with the requirements of Section 77B of the Bankruptcy Act, and to (56) set a day for a hearing upon the plan which the appellant would then submit, being a plan of reorganization as set out, in substance, in the appellant's said second amended and supplemental petition, with notice to all parties interested in such hearing of the time and place thereof, in such manner as the court would provide.

III

It was error to have made any findings of fact, or findings of mixed law and fact as to the plan outlined in the second amended and supplemental petition, before a hearing upon the plan which appellant would submit on a day to be set for that purpose, the setting of a day for such hearing having been moved for by the appellant, and particularly so as to the matters set forth in (3), (4), (5), (6), (7), (8), and (10), of the findings of law and fact, as the same appear in said decree of May 28, 1936.

IV

It was error to find, as was found, the matters set forth in findings (3), (4), (5), (6), (7), (8), and (10) of said decree, because the same are not warranted by the record as presently constituted, nor proper at the stage of the proceedings at the time said decree was entered.

V

It was error to disapprove the appellant's several petitions, and each of them, and to dismiss the same.

VI

It was error to find and hold, in effect, that a plan of reorganization for a debtor corporation under Section

77B of the Bankruptcy Act, which provides for making up all payments in arrears and curing all defaults under the first mortgage on the property of the debtor, setting aside the acceleration of maturity of the first mortgage bonds by reason of such defaults, and remitting the first mortgage bondholders to their former position, without change, (except that the position of the first mortgage (57) bondholders before default will be made much better in this—that the provisions of the Sinking Fund for the retirement of the first mortgage bonds will, under the plan, automatically become much more favorable to the first mortgage bondholders), is not feasible and does not comply with the provisions of Section 77B, unless such plan has been accepted by the holders of two-thirds in amount of the first mortgage bonds.

VII

It was error to find and hold in effect that a plan of reorganization for a debtor corporation under Section 77B of the Bankruptcy Act, which provides for making up all payments in arrears and curing all defaults under the first mortgage on the property of the debtor, setting aside the acceleration of maturity of the first mortgage bonds by reason of such defaults, and remitting the first mortgage bondholders to their former position, without change, (except that the position of the first mortgage bondholders before default will be made much better in this—that the provisions of the Sinking Fund for the retirement of the first mortgage bonds will, under the plan, automatically become much more favorable to the first mortgage bondholders), does not provide adequate protection for the realization by the first mortgage bondholders of the value of their interests, claims, or liens, as required by subdivision (b) of clause (5) of said section of the Bankruptcy Act.

VIII

It was error to find and hold in effect that the claims and interests of the first mortgage bondholders are affected materially and adversely, within the contemplation of the provisions of Section 77B of the Bankruptcy

Act, by reason of a plan of reorganization for a debtor corporation, under said section, which provides for making up all payments in arrears and curing all defaults under the first mortgage on the property of the debtor, (58) setting aside the acceleration of maturity of the first mortgage bonds by reason of such defaults, and remitting the first mortgage bondholders to their former position, without change, except that the position of the first mortgage bondholders before default will be made much better in this—that the provisions of the Sinking Fund for the retirement of the first mortgage bonds will, under the plan, automatically become much more favorable to the first mortgage bondholders.

IX

It was error to find and hold that the original petition, the amended and supplemental petition, and the second amended and supplemental petition of the appellant were not filed in good faith within the meaning of the Bankruptcy Act.

X

It was error to disapprove and reject the plan of reorganization outlined in appellant's second amended and supplemental petition, without affording the appellant an opportunity, at a time set for that purpose, to submit its complete plan and have a hearing thereon, as contemplated by the provisions of Section 77B of the Bankruptcy Act.

XI

It was error to find and hold, in effect, that the second amended and supplemental petition of the appellant and the plan of reorganization, as set out and described therein, do not adequately or fairly provide for the protection of the rights and interests of the holders of the first mortgage bonds of the appellant as required by law, or for the realization by them of the value of their interests or liens.

XII

It was error to find and hold that the appellant's original petition, amended and supplemental petition, and second amended and supplemental petition, do not comply with the provisions of Section 77B of the Bankruptcy Act.

XIII

It was error to find and hold that the petitions, particularly the second amended and supplemental petition, do not present a feasible method of reorganizing the appellant.

(59)

For which errors, the appellant prays that the said decree made and entered as aforesaid on the 28th day of May, 1936, in the above styled proceedings, be reversed, and the said proceedings remanded, with direction to approve the appellant's several petitions, and to find that the same were filed in good faith and otherwise in compliance with the requirements of Section 77B of the Bankruptcy Act, and with further directions to set a day for a hearing upon the plan which the appellant would then submit, being a plan of reorganization as set out, in substance, in the appellant's second amended and supplemental petition, with notice to all parties interested in such hearing of the time and place thereof, and for such other and further relief as may be proper in the premises.

FRED O. BLUE,
ROBERT S. SPILMAN
Counsel for Appellant

BLUE, DAYTON & CAMPBELL,
PRICE, SMITH & SPILMAN,
Of Counsel for Appellant.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Southern District of West Virginia, ss:

I, Ira H. Mottesheard, Clerk of the District Court of (60) the United States for the Southern District of West Virginia, do hereby certify that the foregoing is a true and complete transcript of the record and proceedings, in accordance with the Praecipe, Agreement and Stipulation filed by Counsel for the preparation of same, in the matter of Wayne United Gas Company, Debtor, No. 3187 in Bankruptcy, and now of record and on file in my said office.

IN TESTIMONY WHEREOF, I hereto set my hand and the seal of said Court, at Charleston, in said District, this 26th day of June, 1936, and in the 160th year of the Independence of the United States of America.

IRA H. MOTTESHEARD, Clerk.
D. C. U. S., S. D. W. VA.

(Seal)

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

(61)

No. 4080

Wayne United Gas Company, a corporation, Appellant,

versus

Owens-Illinois Glass Company, Libbey-Owens-Ford Glass Company, The Chase National Bank of the City of New York, a corporation, and Paul C. Beardslee, Trustees, Appellees.

APPEAL from the District Court of the United States for the Southern District of West Virginia, at Charleston.

June 30, 1936, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, bond, and citation are certified up under section 7 of Rule 14.

Same day, the appearance of Fred O. Blue and Robert S. Spilman is entered for the appellant.

Same day, the appearance of H. D. Rummell and A. G. Stone is entered for the appellees.

NOTICE OF MOTION OF APPELLEES TO DISMISS APPEAL.

Filed June 30, 1936.

(Style of Court and Title Omitted.)

To:

BLUE, DAYTON & CAMPBELL,
PRICE, SMITH & SPILMAN,
Counsel for Appellant:

You will please take notice that on Tuesday, June 30, 1936, at 10:00 o'clock A. M., in the City of Asheville, North Carolina, the undersigned will move the United States Circuit Court of Appeals for the Fourth Circuit to dismiss the appeal granted by the District Court of the (62) United States for the Southern District of West Virginia, on June 11, 1936, in the matter of the reorganization of the Wayne United Gas Company.

The grounds of said motion will be that the district court was without jurisdiction to consider the application for rehearing in said proceeding, and that the order of said court, entered May 12, 1936, granting such rehearing, and the further order of said court, entered May 28, 1936, disapproving the petition for reorganization and dismissing said proceeding, were null and void and of no effect whatever. For the reasons aforesaid, the allowance of said appeal on June 11, 1936, was wholly beyond the power and jurisdiction of the district court, the effect thereof being to give the appellant herein an appeal from the final order entered on March 2, 1936, disapproving the petition for reorganization and dismissing said proceeding, more than thirty days after the entry of said order, contrary to the provisions of Section 25-a of the Bankruptcy Statute.

Respectfully,

RUMMEL, BLAGG & STONE
By A. G. STONE
Counsel for Libbey-Owens-Ford Glass Company and Owens-Illinois Glass Company.

Copy of foregoing notice received June 22, 1936:

PRICE, SMITH & SPILMAN
By J. D. ALTIZER
BLUE, DAYTON & CAMPBELL

MOTION OF APPELLEES TO DISMISS APPEAL.

Filed June 30, 1936.

(Style of Court and Title Omitted.)

Come now, the Owens-Illinois Glass Company and the Libbey-Owens-Ford Glass Company, the appellees herein, by H. D. Rummel, their counsel, and move the Court to dismiss with costs the appeal taken herein to this Court by the Wayne United Gas Company, upon the (63) following grounds:

1. The District Court was without jurisdiction to consider the application for rehearing in the above styled proceeding, and the order of the District Court, entered May 12, 1936, granting such rehearing, and the further order of said Court, entered May 28, 1936, disapproving the petition for reorganization and dismissing said proceeding, were null and void.

2. The appeal was not applied for within the time fixed by statute, i. e., within thirty days after the entry of the final order of the District Court of March 2, 1936, disapproving the petition for reorganization and dismissing said proceeding, and the allowance of said appeal on June 11, 1936, was therefore beyond the power and jurisdiction of the District Court, the effect thereof being to give the appellant herein an appeal from the said final order of March 2, 1936, more than thirty days after the entry thereof contrary to the provision of Section 25(a) of the Bankruptcy Act.

RUMMEL, BLAGG & STONE
H. D. RUMMEL
Counsel for Appellees.

Dated June 30, 1936.

ARGUMENT OF CAUSE ON MOTION TO DISMISS

June 30, 1936, (June term, 1936) cause came on to be heard on the motion of the appellees to dismiss the appeal, before Parker, Northcott and Soper, Circuit Judges, and is argued by counsel—further argument postponed until tomorrow, July 1, 1936.

July 1, 1936, (June term, 1936) cause came on to be further heard on the motion of the appellees to dismiss the appeal, before Parker, Northcott and Soper, Circuit Judges, and is further argued by counsel, and submitted.

PER CURIAM OPINION

(64) Filed July 4, 1936.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

No. 4080.

Wayne United Gas Company, a corporation,
Appellant,

versus

Owens-Illinois Glass Company, Libbey-Owens-Ford Glass Company, The Chase National Bank of the City of New York, a corporation, and Paul C. Beardslee, Trustees,

Appellees.

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston.

On Motion of Appellees to dismiss Appeal.

(Argued June 30 and July 1, 1936.
Decided July 4, 1936.)

Before Parker, Northcott and Soper, Circuit Judges.

Robert S. Spilman and Fred O. Blue for Appellant, and H. D. Rummel (A. G. Stone on brief) for Appellees.

Per Curiam:

An order was entered by the court below on March (65) 2, 1936 dismissing a petition for corporate reorganization under Section 77-B of the Bankruptcy Act as amended. A petition for appeal under 24(b) of the Bankruptcy Act was denied by this Court April 15, 1936. See *Wayne United Gas Co.* v. *Owens-Illinois Glass Company et al.* (C. C. A. 4th) 83 Fed. (2d) 98. Thereafter, on April 24, 1936, the debtor filed a petition for rehearing in the court below; and that court on May 12, 1936, entered an order granting a rehearing and setting aside the order of March 2nd. On May 22, 1936, debtor filed an amended and supplemental petition for reorganization which was dismissed on May 28, 1936. Debtor appealed from this order of dismissal and the matter is before us on a motion to dismiss the appeal.

We are of opinion that the court below was without power to grant a rehearing and set aside the order of March 2nd after the expiration of the period allowed for appeal from that order. *United States* v. *East* (C. C. A. 8th) 80 Fed. (2d) 134, 135; *Bonner* v. *Pottorf* (C. C. A. 10th) 47 Fed. (2d) 852, 855; *Stearn* v. *White Co.* (C. C. A. 7th) 295 Fed. 833, 837. The order appealed from as well as the order setting aside the order of

March 2nd was therefore void; and as the effect of these orders was merely to extend the time for appealing from the order of March 2nd, we shall dismiss the appeal as though it had been taken from that order. Authority for this procedure is found in the cases cited.

Appeal Dismissed.

DECREE.

(66) Filed and Entered July 4, 1936.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT

No. 4080.

Wayne United Gas Company, a corporation, Appellant,

vs.

Owens-Illinois Glass Company, Libbey-Owens-Ford Glass Company, The Chase National Bank of the City of New York, a corporation, and Paul C. Beardslee, Trustees, Appellees.

APPEAL from the District Court of the United States for the Southern District of West Virginia, at Charleston.

THIS CAUSE came on to be heard on the motion of the appellees to dismiss the appeal, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the appeal in this cause, be, and the same is hereby, dismissed with costs.

July 4, 1936.

JOHN J. PARKER
Senior Circuit Judge.

STIPULATION AS TO RECORD UPON PETITION OF WAYNE UNITED GAS COMPANY TO THE SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI.

Filed July 24, 1936.

(Style of Court and Title Omitted.)

It is stipulated and agreed by counsel for the above named appellant and appellees that the papers and proceedings hereinafter designated are the parts of the record in the case material upon the petition of said appellant to the Supreme Court of the United States for a writ of *certiorari* to the United States Circuit Court of Appeals for the Fourth Circuit to review its order entered July 4th, 1936, dismissing appellant's appeal from the District Court, and that the transcript of the record accompanying said petition shall consist thereof, namely:

1. Order of the District Court of the United States (67) for the Southern District of West Virginia, entered March 2, 1936, disapproving and dismissing the original and first amended and supplemental petitions of the Debtor, said Wayne United Gas Company, for reorganization.

2. Petition of said Debtor to said District Court to set aside said order of March 2, 1936, and for a rehearing, filed April 24, 1936. (The exhibits marked "Exhibit Decree" and "Exhibit Notice," with said petition are to be omitted.)

3. Said "Petitioner's Assignment of Errors" filed with said petition for rehearing.

4. Order of April 24, 1936, filing said petition and assignment of errors.

5. Order of May 12, 1936, vacating order of March 2, 1936, and granting said petitioner a rehearing.

6. "Debtor's Second Amended and Supplemental Petion under Section 77(B) of the Bankruptcy Act," filed May 28, 1936.

7. Order of May 28, 1936, disapproving and dismissing Debtor's original and first and second amended and supplemental petitions for reorganization.

8. The following statement as to the appeal taken by sai Debtor from said order of May 28, 1936: "It is stipulated and agreed that on June 11, 1936, said Wayne United Gas Company filed in said District Court its petition for an appeal under Section 25(a) of the Bankruptcy Act, as amended, from said decree of May 28, 1936, to the United States Circuit Court of Appeals for the Fourth Circuit, and its assignment of errors (see 9, below) in support thereof; that said appeal, with supersedeas, was allowed by an order of said District Court entered June 11, 1936; that bond with approved security was given by said petitioner on the same day, in compliance with the terms of said order; that notice of said (68) appeal was given by said petitioner on said day to all other parties to this proceeding (the several appellees above named); and that citation was issued upon said appeal and service thereof accepted by all said parties on said June 11, 1936."

9. The above mentioned "Assignment of Errors and Prayer for Reversal" of said Wayne United Gas Company, filed with its said petition for appeal on June 11, 1936.

10. The order of the United States Circuit Court of Appeals for the Fourth Circuit, entered July 4, 1936,

dismissing said appeal of said Wayne United Gas Company, upon motion of said Owens-Illinois Glass Company et al., the appellees above named.

11. Per curiam opinion of said Circuit Court of Appeals, rendered said 4th day of July, 1936, upon said motion.

12. All other proceedings, or proper notation or memoranda thereof, of said Circuit Court of Appeals in this cause subsequent to its entry of said order dismissing said appeal.

13. This stipulation.

FRED O. BLUE
ROBERT S. SPILMAN
Counsel for Wayne United Gas Company.

H. D. RUMMEL
Counsel for Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company.

THOMAS B. JACKSON
Of Counsel for The Chase National Bank of the City of New York and Paul C. Beardslee, Trustees.

Dated: Charleston, West Virginia,
July 23rd, 1936.

July 27, 1936, petition of Appellant for a stay of the mandate is filed.

ORDER STAYING MANDATE.

(69) Filed July 28, 1936.

(Style of Court and Title Omitted.)

UPON THE APPLICATION of the appellant, by its

counsel Fred O. Blue and Robert S. Spilman, and for good cause shown,

IT IS ORDERED that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this Court or the said Supreme Court, and provided said application is filed in the said Supreme Court within 30 days from this date.

July 28, 1936.

JOHN J. PARKER
Senior Circuit Judge.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, CLAUDE M. DEAN, Clerk of the United States Cir-
(70) cuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause, made up in accordance with the stipulation of counsel for the respective parties, as the same remain upon the records and files of the said Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 31st day of July, A. D., 1936.

(Seal of Court)

CLAUDE M. DEAN,
Clerk, U. S. Circuit Court of Appeals, Fourth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U.
FILED
AUG 22 1936
CHARLES ELMORE CROPL
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 305

WAYNE UNITED GAS COMPANY, a corporation, *Petitioner*,

v.) In Bankruptcy.

OWENS-ILLINOIS GLASS COMPANY, LIBBEY-OWENS-FORD GLASS COMPANY, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a corporation, and PAUL C. BEARDSLEE, Trustees, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

FRED O. BLUE,
ROBERT S. SPILMAN,
Counsel for Petitioner.

LOVETT PRINTING CO., CHARLESTON, W. VA.

SUBJECT INDEX

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
I. SUMMARY STATEMENT OF MATTERS INVOLVED	2
(1) Statement of Facts	2
(2) Question Presented	6
II. REASONS RELIED ON FOR ALLOWANCE OF WRIT	6
BRIEF IN SUPPORT OF PETITION FOR CERTIORARI	8
I. OPINIONS BELOW	8
II. JURISDICTION	8
III. STATEMENT OF CASE	9
IV. ARGUMENT	10
(1) A federal District Court has power to set aside a final judgment or decree which it has made and to grant a rehearing after the expiration of the period allowed for appeal therefrom	10
(2) There are no terms in Bankruptcy. A District Court sitting in bankruptcy may set aside any order made by it and grant a rehearing of the matters adjudicated thereby, provided (1) the application for review is seasonably made, and (2) rights have not become vested under the order which will be disturbed by its vacation	13

PAGE

(3) The District Court set aside its order of March 2, 1936, and granted a rehearing in the exercise of a sound judicial discretion and for good cause shown ---------- 17

(4) The decision of the Circuit Court of Appeals for the Fourth Circuit that the District Court, sitting in bankruptcy, had no power to set aside its order of March 2, 1936, and grant a rehearing after the expiration of the period allowed for appeal from that order is in conflict with decisions of the Circuit Courts of Appeals for the Sixth, Eighth and Second Circuits upon the same matter---------- 19

(5) The decisions cited by the learned Circuit Court of Appeals for the Fourth Circuit do not sustain such holding ---------- 23

(6) Said Circuit Court has made a ruling as to federal practice that would tend to introduce confusion into the law if unreviewed ---------- 28

V. CONCLUSION ---------- 30

	PAGE
Aspen Mining Co. v. *Billings*, 150 U. S. 31	11
Bonner v. *Potterf*, 47 F. (2d) 852	24
In re Burr Mfg. & Supply Co., 217 Fed. 874	15
Cameron v. *National Surety Co.*, 272 Fed. 874	21
Chicago M. & St. P. Ry. Co. v. *Leverentz*, 19 F. (2d) 915	11
Clarke v. *Hot Springs Electric L. & P. Co.*, 76 F. (2d) 918	11
Conboy v. *First National Bank*, 203 U. S. 141	26
In re Ives, 113 Fed. 911	16
In re Keyes, 160 Fed. 763	16
Memphis v. *Brown*, 94 U. S. 715	19
Morse v. *United States*, 270 U. S. 151	11
Northwestern P. S. Co. v. *Pfeifer*, 36 F. (2d) 5	11
In re Rochester Sanitarium & Baths Co., 222 Fed. 22	22
Roema v. *Neuman*, 132 U. S. 103	11
Sandusky v. *National Bank*, 23 Wall. 289	15
In re Stearns & White Co., 295 Fed. 833	25
Stickney v. *Wilt*, 23 Wall. 150	16
Todd v. *Alden*, 245 Fed. 462	13
United States v. *East*, 80 F. (2d) 134	23
Wayne United Gas Co. v. *Owens-Illinois Glass Co. et al.*, 83 F. (2d) 98	3
West v. *McLaughlin's Trustee*, 162 Fed. 124	19
In re Wright, 96 Fed. 820	16
Zimmern v. *United States*, ... U. S. ....., 80 L. Ed. 742	29
Zimmern v. *United States*, 79 F. (2d) 703	29
Remington on Bankruptcy, sec. 1069	19

PAGE

Act of May 27, 1926, c. 406, sec. 10, 44 Stat. 665; 11 U. S. C. A., sec. 48 6

Act of February 13, 1925, c. 229, sec. 8(c), 43 Stat. 936; 28 U. S. C. A., sec. 347 8

Act of February 13, 1925, c. 229, sec. 8(c); 28 U. S. C. A. 230 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No.

WAYNE UNITED GAS COMPANY, a corporation, *Petitioner*,

v.) In Bankruptcy.

OWENS-ILLINOIS GLASS COMPANY, LIBBEY-OWENS-FORD GLASS COMPANY, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a corporation, and PAUL C. BEARDSLEE, Trustees, *Respondents*.

PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The petition of Wayne United Gas Company, a corporation, respectfully shows to this Honorable Court:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED

(1)

Statement of Facts

November 25th, 1935, petitioner filed in the District Court of the United States for the Southern District of West Virginia its original petition, and on the 10th day of December, 1935, its amended and supplemental petition for corporate reorganization under Section 77-B of the Bankruptcy Act, as amended.[1]

February 7, 1936, respondents filed their joint and separate objections to the approval of said petitions.

By order entered March 2nd, 1936, (R. 1) the District Court held that said petitions and the plan of reorganization set out therein did not present a feasible method of reorganizing the debtor (this petitioner) and did not adequately or fairly provide for the protection of the rights of the holders of the first mortgage bonds of the debtor, and that the holders of more than 92 per cent of said bonds, (the respondent Glass Companies), had refused to approve or accept said plan, and that said petitions did not comply with the provisions of Section 77-B of the Bankruptcy Act and therefore were not filed in good faith within the meaning of said Act. It accordingly disapproved and dismissed said petitions. (R. 3.)

---

[1] The original and amended petitions are incorporated in petitioner's second amended and supplemental petition, post, found at p. 25 of the Record.

Petitioner desiring to appeal from this order, on March 20, 1936, filed its petition for appeal under Section 24(b) of the Bankruptcy Act in the office of the Clerk of the Circuit Court of Appeals, together with its assignment of errors and other necessary papers, that court then being in vacation. On the first day of the first term of said court following the filing of said petition, April 6th, 1936, petitioner appeared before the court and submitted its petition for such appeal, which the respondents resisted. (R. 10.) By its order made April 15th, 1936, (R. 10) the Circuit Court denied the appeal upon the ground that appeal should have been taken as of right under Section 25(a) of the Bankruptcy Act and not upon petition to the Circuit Court of Appeals therefor under Section 24(b). *Wayne United Gas Company* v. *Owens-Illinois Glass Company, et al.*, (C. C. A. 4th) 83 F. (2d) 98.

Two days thereafter, April 17th, 1936, petitioner notified respondents that on April 24th it would present to the District Court its petition praying that the order of March 2nd, 1936, be vacated and that a rehearing or review of all matters arising in said proceeding be awarded petitioner because of alleged errors set forth in its assignment of errors tendered with said petition (R. 4), and that upon rehearing an order be entered by the District Court awarding petitioner the relief prayed in its original and amended petitions.

By order made April 24, 1936, the District Court directed the petition for rehearing to be filed, and after hearing argument of counsel thereon, took time to con-

sider its judgment. (R. 4.) By order entered May 12, 1936, the District Court vacated its order of March 2, 1936, and granted the rehearing and review prayed by petitioner, setting May 22, 1936, for a hearing "on all questions arising on the record". The District Court found "that good cause exists justifying this court in the exercise of a sound judicial discretion in setting aside, vacating and annulling" the order of March 2, 1936, "and in granting to the said Wayne United Gas Company, the above named debtor, a rehearing of all the issues and matters arising in the above styled proceeding upon the alleged errors set forth in the assignment of errors presented with the aforesaid petition and upon the record in this proceeding". (R. 18.) The court also found that the debtor's petitions to vacate said order of March 2, 1936, and for a rehearing of the matters decided thereby "have been properly and seasonably presented in this cause, and that no rights have become vested under said order * * *" of March 2, 1936, "which will be disturbed by the vacation of said order * * *." (R. 18.)

In its order of May 12th, upon motion of respondents, the District Court certified that a regular term began at Charleston, where the Court was sitting, on April 21, 1936. (R. 19.)

On May 22, 1936, petitioner, by leave of court, filed its second amended and supplemental petition (R. 25), which incorporated in full its first amended and supplemental petition (R. 26), which latter included the original petition. The respondents appeared and resisted petitioner's motion, upon this rehearing, for the approval

of its several petitions and its plan of reorganization, as amended, set forth therein.

By order entered May 28, 1936, the District Court, after full argument, overruled petitioner's motion to approve said petitions and to set a day for hearing upon its proposed plan of reorganization, sustained respondents' objections to said petitions, and disapproved and dismissed the same, for reasons expressed in ten findings of fact and law made by the court, contained in said order. (R. 19.)

June 11, 1936, petitioner's petition for an appeal under Section 25(a) of the Bankruptcy Act from said decree of May 28, 1936, to the Circuit Court of Appeals for the Fourth Circuit, with supersedeas, was granted by the Judge of the District Court and duly perfected (R. 62).

On July 1st, the motion of the appellees, Owens-Illinois Glass Company and others (the respondents here), to dismiss said appeal was argued before the Circuit Court, which by decree entered July 4th sustained the motion and dismissed the appeal (R. 60) upon the ground that the District Court had no power to grant a rehearing and set aside the order of March 2nd after the expiration of the thirty-day period allowed for appeal from that order by Section 25(a) of the Bankruptcy Act. See Per Curiam opinion (R. 58).

This petition is for a writ of certiorari to review the action of the Circuit Court of Appeals in thus dismissing petitioner's appeal.

(2)

Question Presented

The question in this case is whether the District Court had power (jurisdiction) to set aside its order dismissing said petitions for corporate reorganization under Section 77-B of the Bankruptcy Act as amended, and to grant a rehearing, after the expiration of the thirty-day period allowed for appeal from that order by Section 25(a) of the Bankruptcy Act. (Act of May 27, 1926, c. 406, sec. 10, 44 Stat. 665; 11 U. S. C. A., sec. 48.)

II.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

(1)

The decision of the Circuit Court of Appeals for the Fourth Circuit that a District Court sitting in Bankruptcy "is without power to grant a rehearing and set aside" an order previously entered by it "after the expiration of the period allowed for appeal from that order" is in conflict with decisions of the Circuit Courts of Appeals of the Sixth, Eighth and Second Circuits on the same matter.

(2)

Said Circuit Court of Appeals has decided an important question of federal practice in a way in conflict with the weight of authority and the applicable decisions of this Court.

(3)

Said Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of this Honorable Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fourth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the Record and all proceedings in this cause, numbered and entitled on its docket No. 4080, Wayne United Gas Company, a corporation, Appellant, v. Owens-Illinois Glass Company, Libbey-Owens-Ford Glass Company, The Chase National Bank of the City of New York, a corporation, and Paul C. Beardslee, Trustees, Appellees, or the material parts of such Record, and that said decree of the Circuit Court of Appeals for the Fourth Circuit, entered in this proceeding July 4, 1936, dismissing petitioner's said appeal, may be reversed, and that petitioner may have such other and further relief in the premises as to your Honorable Court may seem meet and just.

And your petitioner will ever pray.

FRED O. BLUE,
ROBERT S. SPILMAN,
Counsel for Petitioner.

Date: August 12, 1936,
Charleston, West Virginia.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

OPINIONS BELOW

No opinion was filed by the District Court (McClintic, J.).

The findings of the District Court as to the propriety of vacating its order of March 2, 1936, and of granting a rehearing, are contained in the court's order of May 12, 1936 (R. 18). And its reasons, upon rehearing, for overruling petitioner's motions and dismissing its petitions for reorganization are set forth in its findings of fact and law, contained in its order of May 28, 1936 (R. 19).

The opinion of the Circuit Court of Appeals, (Judges Parker, Northcott and Soper) Per Curiam, was filed July 4, 1936. This opinion is not yet reported. It is found at p. 58 of the Record.

II.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1935, Chap. 229, 43 Stat. 936; 28 U. S. C. A. Sec. 347.

The decree of the Circuit Court of Appeals dismissing petitioner's appeal was entered July 4, 1936 (R. 60).

III.

STATEMENT OF THE CASE

The material facts, with appropriate page references to the printed Record, are stated in the Petition, *supra*, pages 1 to 7, inclusive.

A summary of the argument appears in the subject index.

The error intended here to be urged is:

The action of the Circuit Court of Appeals in holding that the District Court was without power to grant a rehearing and set aside its order of March 2nd, 1936, after the expiration of the period allowed for appeal from that order; and in consequence thereof;

(a) That the order of the District Court appealed from, entered May 28th, 1936, upon rehearing, as well as that court's order of May 12th, 1936, setting aside its order of March 2nd, was void;

(b) That the effect of these orders was merely to extend the time for appealing from the order of March 2nd;

(c) That petitioner's appeal from said order of May 28th should be dismissed as though it had been taken from the order of March 2nd; and

(d) That the cases cited in its opinion furnish authority for such procedure.

IV.

ARGUMENT

(1)

A federal District Court has power to set aside a final judgment or decree which it has made and to grant a rehearing after the expiration of the period allowed for appeal therefrom.

It is clear, we submit, under the federal decisions that an unsuccessful litigant in a District Court may exercise either of two rights to obtain a review of its judgment or decree against him: (1) He may appeal to the proper appellate court, usually the Circuit Court of Appeals, within the time prescribed by the appropriate federal statute for such appeal; or (2) he may apply to the District Court which made the judgment or decree of which he complains to set it aside and grant him a rehearing within the period prescribed by appropriate rules or decisions of the Federal Courts for such review.

The limitation imposed by law for taking the one or the other of these two courses is not the same. It has long been settled that a party seeking review of either a judgment at law or a decree in equity may for good cause shown have such judgment or decree set aside and a rehearing of the matters adjudicated thereby granted him by the District Court after the period of three months from the entry thereof prescribed by the federal statute for appeal to the Circuit Court of Appeals (Act of February 13, 1925, C. 229, Sec. 8(c); 28 U. S. C. A., Sec. 230) has expired, provided application is made to the

District Court and entertained by it at the same term at which such judgment or decree is entered. *Morse* v. *United States,* 270 U. S. 151, 154. This right is "in no way controlled by the fact that the time for appeal has expired". *Northwestern P. S. Co.* v. *Pfeifer,* (C. C. A. 8th) 36 F. (2d) 5, 8. If the District Court, in the exercise of a sound discretion grant the application to review its own order and to this end sets aside such order, its judgment or decree made upon the rehearing becomes the final order in the case, and the time for taking an appeal runs not from the date of the original order but from the date of entry of the order made upon rehearing. *Aspen Mining Co.* v. *Billings,* 150 U. S. 31, 36; *Clarke* v. *Hot Springs Electric L. & P. Co.,* (C. C. A. 10th) 76 F. (2d) 918, 921. A party who permits the time for appeal to expire before applying to the District Court for rehearing, even though this be done within the term, takes the chance of losing all remedy by appeal; for if the District Court, in its discretion, deny his motion (at law) or his petition (in equity) for a rehearing, no appeal lies from its order denying the rehearing. *Roema* v. *Neuman,* 132 U. S. 103, 106. And the mere filing of the motion or petition, after the time for appeal has expired, does not toll the limit prescribed by statute for taking the appeal. *Chicago M. & St. P. Ry. Co.* v. *Leverentz* (C. C. A. 8th) 19 F. (2d) 915, 917. The Circuit Court of Appeals for the Eighth Circuit, in the case last cited, in dismissing an appeal taken from an order of the District Court *denying a new trial*, made after the expiration of three months from the entry of its final judgment, quoted with approval the following holding of the District Court sustaining the power of that court

to entertain a motion for rehearing after the time for appeal had expired:

> "Notwithstanding a defeated party may have lost the right to bring error, he may, under the rules, still have the right within the term to make a motion for a new trial, and to have the benefit of the court's judgment thereon. If the court shall grant the motion, a new trial will follow. If the court shall deny the motion, there is no remedy. The privilege of presenting a motion for a new trial and of having it heard and determined on its merits, *even after the time within which to sue out a writ of error has expired, is a valuable right.* There is no authority for denying it in this case. The motion for a new trial should, therefore, be considered on its merits."[2]

And in *Clarke* v. *Hot Springs Electric L. & P. Co., supra,* the Circuit Court of Appeals for the Tenth Circuit, after sharply contrasting the situation where a petition for rehearing is filed within the term, but before the time for appeal has expired, with that where the petition is filed within the term but after the expiration of such period, said as to the latter:

> "* * * A petition for rehearing cannot resurrect a right of appeal which has expired. If filed within the term, even after the time for appeal has expired, the trial court may grant it, thus vacate the decree, and start again, but if the rehearing is denied, the original decree stands, and the right of appeal is not revived. All this has been carefully spelled out by the courts." (Citing *Conboy* v. *First Nat. Bank,* 203 U. S. 141, and other authorities.)

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[2] All italics in this brief are ours.

The *power* or *jurisdiction* of the District Court in the exercise of its discretion to set aside its judgment or decree and grant a rehearing after the time prescribed for appeal therefrom has expired, upon timely application, cannot, we submit, reasonably be doubted. The same power has frequently been exercised in bankruptcy proceedings, with the same effect. In denying a motion to dismiss an appeal, the Circuit Court of Appeals for the Eighth Circuit held in *Todd* v. *Alden* (C. C. A. 8th) 245 Fed. 462:

> "Where, after an order allowing a claim in bankruptcy, a rehearing is *granted*, the time for taking an appeal is extended, and runs from the time the order is made final."

(2)

There are no terms in Bankruptcy.

A District Court sitting in bankruptcy may set aside any order made by it and grant a rehearing of the matters adjudicated thereby, provided (1) the application for review is seasonably made, and (2) rights have not become vested under the order which will be disturbed by its vacation.

When Congress passed the first Bankruptcy Act of 1867, it conferred upon the District Courts the administration thereof. Since bankruptcy was a purely statutory creation, and fundamentally at variance with common law principles, it was recognized that certain rules of procedure which had their origin in the common law had no application to bankruptcy proceedings. It was

early decided that the District Courts sitting in bankruptcy knew no terms, and accordingly their power over their own proceedings was unaffected by rules and principles which limited the power of the same courts sitting at law or in equity to review their own orders only within prescribed terms of the court.

It does not follow, of course, that no limitation is imposed by federal law upon the power of the District Court sitting in bankruptcy to grant rehearings. The limitation, as early stated by this court and consistently followed, is that the rehearing must be granted upon application seasonably made, and that it must appear that rights have not become vested under the order sought to be reviewed which will be disturbed by its vacation. It has never been held, so far as we can find, that application for a rehearing in bankruptcy must be made at the same term of court at which the order sought to be reviewed was entered.

We are concerned here with the narrow question of the power of the District Court to review its order dismissing a "petition for corporate reorganization under Section 77-B of the Bankruptcy Act as amended", after the time for appeal from that order had expired and after the term at which the order was entered had ended. (Opinion of Circuit Court herein, R. 58.) In its opinion rendered April 15, 1936, denying petitioner an appeal under Section 24(b), the same court held that the order of the District Court (of March 2nd, 1936) dismissing said petition for reorganization is "the equivalent for procedural purposes of a judgment refusing to adjudge

petitioner a bankrupt". *Wayne United Gas Co.* v. *Owens-Illinois Glass Co. et al.*, (C. C. A. 4th) 83 F. (2d) 98. The question now under consideration is whether the District Court, sitting in bankruptcy, has *power* to review this order after a new term of court has commenced.

We think the applicable principle was thus stated in *Sandusky* v. *National Bank*, 23 Wall. 289, 293 (1874):

> "* * * The district court, for all the purposes of its bankruptcy jurisdiction, is always open. *It has no separate terms.* Its proceedings in any pending suit are, therefore, at all times open for reexamination upon application therefor in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation."

Following the Sandusky case the Court of Appeals for the Second Circuit in *In re Rochester Sanitarium & Baths Co.*, (C. C. A. 2nd) 222 Fed. 22, 26, held:

> "There are no terms of court in bankruptcy, so that an adjudication of bankruptcy, it is held, may be vacated after the expiration of the term wherein it was entered."

The same court in *In re Burr Mfg. & Supply Co.*, (C. C. A. 2nd) 217 Fed. 16, 18, said, in answer to the argument that a confirmation order having been made at one term and the order vacating it at another presided over by

another judge, the court had no power to vacate its original order:

> "It is, of course, true that as a general rule the power of the court to modify its orders expires with the term. But there are no terms in bankruptcy, and the principle which the learned counsel invokes that a court has no power to vacate its order other than at the term in which it was granted is inapplicable to the facts of this case."

To the same effect, among numerous other cases, are:

> *Stickney* v. *Wilt*, 23 Wall. 150, 164;
> *In re Ives*, (C. C. A. 6th) 113 Fed. 911, 913;
> *In re Wright*, (D. C. D. Mass.) 96 Fed. 820;
> *In re Keyes*, (D. C. D. Mass.) 160 Fed. 763, 764.

It is submitted that the action of the District Court in the case at bar is sustained by the doctrine of the Sandusky case and the line of federal decisions which has followed it. Although application for rehearing was made after the time for appeal from the court's original order of March 2nd had expired, and within a few days after the term ended, the District Court found: (1) That petitioner's application and motion "have been properly and seasonably presented in this cause", and (2) that "no rights have become vested under said order or decree entered herein on March 2nd, 1936, which will be disturbed by the vacation of said order or decree" (R. 18).

Neither of these findings has been or can be challenged.

(3)

The District Court set aside its order of March 2, 1936, in the exercise of a sound judicial discretion and for good cause shown.

The District Court did not act upon petitioner's application without mature consideration. On April 24th, after due notice to respondents, petitioner filed its petition to set aside the order of March 2nd "because of error in said order or decree upon the grounds set forth in the assignment of errors presented therewith" (R. 6). Petitioner pointed out specifically numerous respects in which it conceived the District Court erred in its order of March 2nd in holding that the plan of reorganization submitted by petitioner did not comply with the provisions of Section 77-B, and was not filed in good faith. After full argument, and consideration of the matter for three weeks, the court found, as set forth in its order of May 12th,

> "that good cause exists justifying this court, in the exercise of a sound judicial discretion, in setting aside, vacating and annulling the aforesaid order or decree entered by this court in the above styled proceeding on the 2nd day of March, 1936, and in granting to the said Wayne United Gas Company, the above named Debtor, a rehearing of all the issues and matters arising in the above styled proceeding upon the alleged errors set forth in the assignment of errors presented with the aforesaid petition, and upon the record in this proceeding."[3]

[3] The Circuit Court of Appeals for the Seventh Circuit has recently held, *In re Georgian Hotel Corporation*, 82 F. (2d) 917, 920 (March 31, 1936), that the fact that a receivership suit was pending in a state court, which had rendered a decree of foreclosure, did not deprive the bankruptcy court of jurisdiction of a reorganization proceeding under Section 77-B.

Argument of the questions arising upon the rehearing was set by the same order for May 22nd. On that day the petitioner filed its second amended and supplemental petition for reorganization, amending its former plan in important respects more favorable to the first mortgage bondholders. The hearing on May 22nd, as shown by the order of the court entered thereon on May 28th, was in no sense perfunctory or merely formal. This order shows (R. 19) that the court went thoroughly and carefully into the merits of petitioner's motion. It made ten separate findings of law and fact upon the record then before it, including petitioner's second amended and supplemental petition that day filed. The court's conclusion, in view of its findings, was "to dismiss the Debtor's several petitions". It stayed the effect of its order for thirty days to enable the Debtor to appeal therefrom. The instant appeal was taken and perfected well within the thirty-day period, namely, on June 11, 1936 (R. 62).

It is submitted, in these circumstances, that the mere fact that the District Court upon rehearing reached the same ultimate conclusion that it had reached upon its former hearing on March 2nd *does not destroy its power or jurisdiction to grant the rehearing*, or even show any abuse of judicial discretion. (*West* v. *McLaughlin's Trustee*, (C. C. A. 6th), 162 Fed. 124, 125, post (4).)

The learned Circuit Court apparently attached controlling weight to the fact that the ultimate result of the rehearing was the same as that of the original hearing, and from this deduced the conclusion that the sole pur-

pose of the District Court in granting the rehearing was to restore petitioner's right of appeal from the order of March 2nd. This, we submit, is in conflict with the Record, by which alone courts speak.

(4)

The decision of the Circuit Court of Appeals for the Fourth Circuit that the District Court, sitting in bankruptcy, had no power to set aside its order of March 2, 1936, and grant a rehearing after the expiration of the period allowed for appeal from that order is in conflict with decisions of the Circuit Courts of Appeals for the Sixth, Eighth and Second Circuits on the same matter.

1. *West* v. *McLaughlin's Trustee,* (C. C. A. 6th) 162 Fed. 124, 125.

In this case a rehearing was granted by the District Court after the time for an appeal from a final order had expired under Section 25(a) of the Bankruptcy Act. The District Court, upon the rehearing, reached the same conclusion it had reached upon the former hearing. An appeal was taken from the order upon rehearing. The Circuit Court of Appeals overruled appellee's motion to dismiss the appeal. After stating that it could not accept the contention sustained by some decisions[4] that it would not be an *abuse of the discretion* of the court to set

[4] *Memphis* v. *Brown,* 94 U. S. 715, 718; *Sage* v. *Central R. Co.,* 93 U. S. 412, 419; *Stickney* v. *Wilt,* 23 Wall. 150, 164; *In re Hudson Cloth ng Co.,* (D. C. Me.) 140 Fed. 49, 50; *In re Wright,* (D. C. Mass.) 96 Fed. 820; Remington on Bankruptcy, Sec. 1069; hold that a court may set aside its order and grant a rehearing for the sole purpose of restoring a right of appeal which has been lost without culpable neglect by expiration of the period limited for taking it.

aside an order for the *sole purpose* of extending the time for an appeal, the court said:

> "* * * The record shows that it was not a mere proposition to evade Section 25(a) that induced the court below to set aside its order in this instance, but that it was done in order to have further investigation, and the learned judge of the District Court not only reaffirmed the questions involved, but more elaborately stated his views thereon. *The fact that he again arrived at the same conclusion did not neutralize his power to grant the rehearing, though some concession to the supposed hardship of the case may have had weight with him.* Having reached the conclusion that there was no abuse of the court's discretion in granting the rehearing, the motion to dismiss the appeal will be denied."

The same essential facts stated in the above quotation from the West case are present here. It is certainly true in the case at bar that the judge of the District Court "more elaborately stated his views" upon the rehearing of May 28th than upon the original hearing of March 2nd. It is as true here as in the West case that "the fact that he (the District Judge) again arrived at the same conclusion" upon the rehearing as upon the original hearing "did not neutralize his power to grant the rehearing". It is, of course, as impossible here as it was in the West case to negative the argument that "some concession to the supposed hardship of the case may have had weight with him". But granting this, there is ample justification here, as there, for holding "that there was no abuse of the court's discretion in granting the rehearing".

2. *Cameron* v. *National Surety Co.* (C. C. A. 8th) 272 Fed. 874, 875.

The District Court, on July 1, 1920, set aside an order entered May 17, 1920, adjudging the appellant a bankrupt upon motion made after the time for taking an appeal from the original order (then ten days) had expired. In overruling a motion to dismiss the appeal the court said:

> "* * * The petition to vacate the order of May 17, 1920, was filed June 1, 1920. It is therefore claimed that, the petition to vacate not having been filed within the time allowed for an appeal from the first order, and the *order appealed from being the same as the first order,* the time for taking an appeal had expired when the present appeal was taken. We think that this contention is unsound, in view of the record before us. The order of June 1, 1920, provided that the order of May 17, 1920, 'be and the same is hereby in all things set aside.' The order of August 19, 1920, from which the appeal was taken, does not affirm the order of May 17, 1920, nor refer to it, but is an independent order made upon the pleadings and proofs; so we are of the opinion that on the record as it stands, the order appealed from was the only order in existence and that the time for taking an appeal ran from its date. The appeal was allowed August 20, 1920. The order vacating the first order was not appealed from and is conclusive on this appeal. *We therefore have jurisdiction. Todd* v. *Alden,* 245 Fed. 462, 157 C. C. A. 624."

3. *In re Rochester Sanitarium & Baths Co.* (C. C. A. 2nd) 222 Fed. 22, 26.

Here the Circuit Court of Appeals for the Second Circuit, upon appeal from an order granting a rehearing entered after the time for appealing from the original order had expired, and also after the term of court at which it was entered had ended, said, after stating that the power to vacate judgments is inherent in courts of general jurisdiction:

> "But the power is to be exercised by the court which rendered the judgment, and none other can take cognizance of the application. And a motion to set aside a judgment is addressed to the sound legal discretion of the court, and its determination of the matter is not disturbed on appeal *unless it is plain that its discretion has been abused*. The greater power includes the less, and the common-law rule is that a court has entire control over its own orders, and may vacate them at any time during the term at which they are made. (Citing authorities.) There are no terms of court in bankruptcy, so that an adjudication of bankruptcy, it is held, may be vacated after the expiration of the term wherein it was entered."

To the same effect are:

Todd v. *Alden* (C. C. A. 8th) 245 Fed. 462, *supra*;
In re Burr Mfg. Co. (C. C. A. 2nd) 217 Fed. 16, *supra*;
In re Ives, (C. C. A. 6th) 113 Fed. 911, *supra*;
In re Keyes, (D. C.) 160 Fed. 763, *supra*.

(5)

It is respectfully submitted that the decisions cited by the Circuit Court of Appeals for the Fourth Circuit do not sustain its proposition "that the court below was without power to grant a rehearing and set aside the order of March 2nd after the expiration of the period allowed for appeal from that order". (Opinion, R. 58.)

Three cases are referred to as sustaining this holding, namely:

(1) *United States* v. *East* (C. C. A. 8th) 80 F. (2d) 134, 135. In this case some three months after the claim of the Government for taxes had been denied by the District Court it filed a petition to review the order denying its claim on the ground that a rehearing was necessary to enable the Government to take an appeal in the event it should decide to do so. The Government's petition was presented ex parte and was granted on the same day it was made. The District Court in its order made the finding that "on January 13, 1933, upon petition filed on that day, the court granted a rehearing *for the purpose of enabling the United States of America to perfect an appeal to the Circuit Court of Appeals*". By the same order the District Court denied the petition. Upon this finding and record the Circuit Court of Appeals for the Eighth Circuit dismissed the appeal. This record is essentially different from that in the instant case. So far from the record here showing that the rehearing was granted by the District Court for the sole purpose of enabling petitioner to perfect an appeal, the record is that the rehearing was granted in order to en-

able the court more fully to consider the correctness of its former decision in the light of the assignments of error thereto, specifying errors complained of by petitioner.

In the East case the order granting the rehearing was made ex parte without argument of counsel and without any reason being assigned by petitioner or considered by the court for the propriety thereof, except the Government's necessity that the former order be set aside and re-entered in order to enable it to take an appeal. The present record shows the exact opposite in all these particulars. It is therefore submitted that the instant case is ruled not by the East decision, but by the decision of the same court (C. C. A. 8th) in *Cameron* v. *National Surety Co., supra.*

(2) *Bonner* v. *Potterf* (C. C. A. 10th) 47 F. (2d) 852, 855.

The point ruled in this case is not that the trial judge lacked power to grant the rehearing, but that his action was "beyond the sound discretion of the court". In granting the rehearing after the time for appeal had expired, the District Court made an order containing the following finding:

> "I find that the motion of W. M. Bonner to reopen this case should be overruled and an order to that effect will be entered at Muskogee on November 6, 1929. The order of January 17, 1929, overruling exceptions will be reentered on November 6, 1929, (so) as to give Bonner opportun-

> ity to appeal the test question as to whether it is final order, etc., and seek a review on order of court overruling exception."

In sustaining a motion to dismiss an appeal from this order, the Circuit Court held that it conclusively appeared from the record that the trial judge merely attempted to reenter the original order for the purpose of allowing an appeal from it, the new order incorporating the old one, and that it did not appear that the trial judge in any way reconsidered his former action in making a new order. Its conclusion was:

> "It is therefore apparent that this action of the court was simply a reentry of the original order for the sole purpose of saving the rights of the appellant in regard to appeal which, under such circumstances, *is a matter, beyond the sound discretion of the court, and amounts to an ineffective gesture to revive the right to appeal.*" (p. 855.)

(3) *In re Stearns & White Co.* (C. C. A. 7th) 295 Fed. 833, 837.

Here the bankrupt, on April 12th, moved the District Court to vacate orders entered by it on February 3rd and 28th allowing a claim against it for approximately $17,000 for the express purpose of reinstating the right of appeal which had been lost. The court by an informal ex parte order entered on the same day, April 12th, vacated its two prior orders and again denied the bankrupt relief, this action being taken solely for the purpose of restoring the right to appeal. This clearly appears from the District Court's order of April 12th, reading as follows:

> "Orders of February 3rd and 28th vacated—petn. of Stearns & White to review order of F. L. Wean of July 11, 1932, denied—and order of referee affirmed." (p. 834.)

The record in the Stearns & White case was substantially the same as the record in the East and Bonner cases. In all three the record showed that the rehearing was granted ex parte and without consideration either of the merits of the motion or the possibility of error in the court's former order, and for the sole purpose of allowing an appeal to be taken from that order. However, in the Stearns & White case the court, in dismissing the appeal, said that the District Court was without power to grant the rehearing, instead of grounding its action upon an erroneous exercise of discretion by the District Court,—as in the East and Bonner cases. In this respect the learned court, it is submitted, proceeded on a misconception of the holding of this court in *Conboy* v. *First National Bank*, 203 U. S. 141, by saying:

> "The Conboy case very conclusively holds that, where there is no petition for rehearing or other action taken within the time allowed for the appeal, nothing done thereafter can be of any avail." (p. 840.)

All that the Conboy case decided was that the *mere filing* in a Circuit Court of Appeals of a petition for rehearing, which was *denied,* did not extend the time for taking an appeal to this Court from the order of the Circuit Court sought to be reviewed. By waiting until after the time for appeal had expired, the petitioner took the risk of losing his right of appeal. If his petition for

rehearing had been granted, the former order against him would have been superseded by the order granting the rehearing, and the time for appeal would have run from the order granting the rehearing under the authorities hereinbefore cited (ante, p. 19 *et seq.*). But where the petition for rehearing was denied (which was the result in the Conboy case), two consequences followed: (1) No appeal could be taken from the order denying the rehearing because the allowance thereof was discretionary with the Circuit Court to which the application was addressed; and (2) the mere application for a rehearing did not enlarge the time for taking an appeal from the original order. That this is the substance of the ruling in the Conboy case appears from the court's holding therein:

> "No appeal lies from orders *denying* petitions for rehearing which are addressed to the discretion of the court and designed to afford it an opportunity to correct its own errors." (203 U. S. at p. 145.)

The court in the Conboy case declined to decide what would have been the effect upon petitioner's right to appeal if his petition for rehearing had been granted. That it deliberately left this question open appears from the final paragraph of its opinion:

> "The petition was denied. Whether it could have been granted in view of the terms and spirit of the Bankruptcy Act, or the effect, if it had been, we are not called upon to discuss." (203 U. S. at p. 146.)

There are a number of decisions which correctly apply the doctrine of the Conboy case by holding that no appeal lies from an order of a District Court *denying* a motion to vacate a prior order and grant a rehearing where such motion is made after the time limited for taking an appeal from the first order has expired.[5] All of these cases proceed upon the principle that if a party permit the time limited for his appeal to expire before moving to vacate the adverse order, the mere filing of his motion does not restore the right to an appeal which has already been lost, and if the motion be denied no appeal lies from the order denying the rehearing. That this is not the situation presented by the record in the instant case is apparent.

(6)

The Circuit Court of Appeals for the Fourth Circuit has made a ruling as to federal practice that will tend to introduce confusion into the law if unreviewed.

The question of practice involved here is important. The Circuit Court has not based its opinion on the ground that the District Court *abused* its power, but on the ground that the District Court *"was without power to grant a rehearing"*. If the opinion of the Circuit Court in the instant case be unreviewed, the power of the District Courts in the Fourth Circuit sitting in bankruptcy to review their own orders is limited to an extent not imposed upon District Courts in other circuits.

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[5] These include such cases as *Morgan* v. *Benedum*, (C. C. A. 4th) 157 Fed. 232; *Rode & Horn* v. *Phipps* (C. C. A. 6th) Fed. 414; *Ewing* v. *Russel Hdwe. Co.* (C. C. A. 8th) 287 Fed. 545; *Foster* v. *McMasters*, (C. C. A. 8th) 15 F. (2d) 751.

This Court, in *Zimmern* v. *United States,* ..... U. S. ....., 80 L. Ed. 742, (Adv. Ops. Oct. Term, 1935, p. 742; decided April 27, 1936) reviewed and reversed a ruling of the Circuit Court of Appeals for the Fifth Circuit in order to avoid confusion upon a related question of practice.

The District Court, in the Zimmern case, which was a proceeding in equity to cancel certain deeds, extended a term of court for the avowed purpose of modifying or amending its final decree. One of the defendants filed a petition for rehearing "when the time to appeal had already gone by, if the original decree was then presently in force", (p. 743).. The Circuit Court of Appeals for the Fifth Circuit dismissed the appeals upon the ground that:

> "Motion for rehearing filed in trial court *after expiration of three months from final decree came too late,* and was ineffective to extend time for taking appeal."

Zimmern v. *United States* (C. C. A. 5th) 79 F. (2d) 703.[6]

This Court granted certiorari upon the ground that the decree of the Circuit Court was a ruling as to practice "that might tend, if erroneous, to introduce confusion into the law" (p. 774). In reversing the Circuit Court, this Court noted that under the applicable statute (U. S. C. A., Title 28, Sec. 230) the appeals of the defendants were too late if the time is to be computed from

[6] Rehearing denied, 80 F. (2d) 993.

the date of the decree as originally entered, but they were regular if the time is to be computed from the date of the amendment, and said:

> "The judge had plenary power while the term was in existence to modify his judgment for error of fact or law, or even revoke it altogether."

The Circuit Court of Appeals for the Fourth Circuit, by its decision in the instant case, has narrowed the power of the District Judge by imposing limitations not recognized in other Circuits and inconsistent with established rules of federal practice approved by this Court. We submit that its ruling should be reviewed for the reason that it "will tend, if erroneous, to introduce confusion into the law".

V.

CONCLUSION

It is submitted that this case calls for the exercise by this Court of its supervisory power in order that the conflict noted between the decision herein and the decisions of the Circuit Courts of Appeals of other circuits, and the question of federal practice involved, may be settled by this Court; and to such end that a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Fourth Circuit and finally reverse it.

FRED O. BLUE,
ROBERT S. SPILMAN,
Counsel for Petitioner.

FILE COPY

DEC 8 1936

CHARLES ELMORE CROP

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 305

WAYNE UNITED GAS COMPANY, a Corporation,

Petitioner,

v.

OWENS-ILLINOIS GLASS COMPANY, LIBBEY-OWENS-FORD GLASS COMPANY, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a corporation, and PAUL C. BEARDSLEE, TRUSTEES,

Respondents.

BRIEF FOR PETITIONER

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statement	2
Specification of Errors	7
Summary of Argument	8

Argument:

I. A federal district court has power to set aside a final judgment or decree which it has made and to grant a rehearing after the expiration of the period allowed for appeal therefrom.

In cases at law or in equity, the only limitation upon this power is that it must be exercised, or application for rehearing made, during the term at which such judgment or decree was entered 9

II. There are no terms in bankruptcy.
A district court sitting in bankruptcy may set aside any order made by it and grant a rehearing of the matters adjudicated thereby, provided (1) the application for review is seasonably made, and (2) rights have not become vested under the order which will be disturbed by its vacation 15

(1) The decision of the Circuit Court of Appeals for the Fourth Circuit that the District Court sitting in bankruptcy had no power to set aside its order of March 2, 1936, and grant a rehearing after the expiration of the period allowed for appeal from that order, is contrary to the weight of authority and in conflict with

Page

decisions of the Circuit Courts of Appeals for the Sixth, Eighth and Second Circuits on the same matter and to the rule recognized in the Third Circuit.

The Circuit Court has decided an important question of federal practice in a way in conflict with applicable decisions of this Court 21

(2) The decisions cited by the learned Circuit Court of Appeals for the Fourth Circuit do not sustain its proposition "that the court below was without power to grant a rehearing and set aside the order of March 2nd after the expiration of the period allowed for appeal from that order" 29

(3) The District Court set aside its order of March 2, 1936, in the exercise of a sound judicial discretion and for good cause shown 38

Conclusion 41

Appendix:

A. Sections 24 and 25, as amended, of the Bankruptcy Act of 1898 43

B. Relevant parts of Section 77B 45

CITATIONS

Page

CASES:

American S. S. Nav. Co., In re, 14 F. Supp. 106 27

Aspen Mining Co. v. *Billings*, 150 U. S. 31 10

Bonner v, *Potterf*, 47 F, (2d) 852 31

Cooper v. *Rauch*, 82 F, (2d) 1005 27

Burr Mfg. & Supply Co., In re, 217 Fed. 16 18

Cameron v. *National Surety Co.*, 272 Fed. 874 24

Chicago etc. Ry. Co. v. *Leverentz*, 19 F. (2d) 915 11

Clarke v. *Hot Spring etc. Co.*, 76 F. (2d) 918 ..... 10, 11

Conboy v. *First National Bank*, 203 U. S. 141 34

Freed v. *Central Trust Co.*, 215 Fed. 873 19

Ives, In re, 113 Fed. 911 ..... 18, 20, 24, 36

Kingman v. *Western Mfg. Co.*, 170 U. S. 675 10

Keyes, In re, 160 Fed. 763 20

Larkin Packer Co. v. *Hinderliter Tool Co.*, 60 F. (2d) 491 13

Lemmon & Gale Co., In re, 112 Fed. 296 ..... 18, 36

Memphis v. *Brown*, 94 U. S. 715 10

Northwestern P. S. Co. v. *Pfeifer*, 36 F. (2d) 5 ..... 10, 12

Rochester etc. Baths Co., In re, 222 Fed. 22 ..... 18, 26

Roemer v. *Neumann*, 132 U. S. 103 10

Sandusky v. *National Bank*, 23 Wall. 289 17

Stearns & White Co., In re, 295 Fed. 833 33

Stickney v. *Wilt*, 23 Wall. 150 16

Todd v. *Alden*, 245 Fed. 462 15

United States v. *McIntosh*, 3 F. Supp. 715 ..... 14, 27

McIntosh v. *United States*, 70 F. (2d) 507 14

United States v. *East*, 80 F. (2d) 134 29

Wayne United Gas Co. v. *Owens-Illinois Glass Co., et al.*, 83 F. (2d) 98 ..... 4, 17

Same v. *Same*, 84 F. (2d) 965 17

West v. *McLaughlin's Trustee*, 162 Fed. 124 ..... 7, 22, 40

Worchester County, In re, 102 Fed. 808 20

Wright, In re, 96 Fed. 820 20

Zimmern v. *United States*, ... U. S. ....., 80 L. Ed. 742 28

Zimmern v. *United States*, 79 F. (2d) 703 28

STATUTES:

Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925, c. 229, 43 Stat. 938; 28 U. S. C. A. 347 2

Act of February 13, 1925, c. 229, 43 Stat. 938; 28 U. S. C. A., sec. 347 2

Act of July 1, 1898, c. 541, sec. 25, 30 Stat. 553; Act of May 27, 1926, c. 406, sec. 10, 44 Stat. 665; 11 U. S. C. A., sec. 48 2

Act of June 7, 1934, 48 Stat. 911, as amended by Act of August 30, 1935, c. 577, 49 Stat. 965, as amended by Act of August 29, 1935, c. 809, 49 Stat. 965; U. S. C. A., sec. 207 3

AUTHORITY:

Remington on Bankruptcy (4th ed.) sec. 502; id. sec. 1067; id. sec. 3859 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 305

WAYNE UNITED GAS COMPANY, a Corporation,
Petitioner,

v.

OWENS-ILLINOIS GLASS COMPANY, LIBBEY-OWENS-FORD GLASS COMPANY, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a corporation, and PAUL C. BEARDSLEE, TRUSTEES,
Respondents.

BRIEF FOR PETITIONER

OPINION BELOW

The District Court delivered no written opinion. The opinion of the Circuit Court of Appeals (R. 58) is reported in 84 F. (2d) 965.

JURISDICTION

The decree of the Circuit Court of Appeals was entered July 4, 1936 (R. 60). The petition for

certiorari was filed August 22, 1936, and granted October 12, 1936. The jurisdiction of this Court rests on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938; 28 U. S. C. A. Sec. 347.

QUESTION PRESENTED

The single question in this case is whether the District Court had power (jurisdiction) to set aside its order dismissing petitions for corporate reorganization filed by petitioner under Section 77-B of the Bankruptcy Act, and to grant a rehearing of the questions arising upon the objections of the respondents to said petitions, after the expiration of the thirty-day period allowed for appeal from that order by Section 25(a) of the Bankruptcy Act. (Act of July 1, 1898, c. 541, sec. 25, 30 Stat. 553; Act of May 27, 1926, c. 406, sec. 10, 44 Stat. 665; 11 U. S. C. A. Sec. 48).*

STATEMENT

Petitioner on November 25, 1935, filed in the District Court of the United States for the Southern District of West Virginia its original petition (R. 1), and on the 10th day of December, 1935, its amended and supplemental petition (R. 1) for corporate reorganization under Section 77-B of the Bankruptcy Act as amended.[1]

* Sections 24 and 25 of the Bankruptcy Act are quoted in full in Appendix A and the relevant parts of Section 77-B in Appendix B, hereto.

[1] The original and amended petitions are incorporated in petitioner's second amended and supplemental petition, post, found at p. 25 of the Record.

(Act of June 7, 1934, 48 Stat. 911, as amended by Act of August 20, 1935, c. 577, 49 Stat. 965, as amended by Act of August 29, 1935, c. 809, 49 Stat. 965; 11 U. S. C. A. Sec. 207).

February 7, 1936, respondents filed their joint and separate objections to the approval of said petitions and motions to dismiss them. (R. 1, 2).

By order entered March 2, 1936, the District Court held that said petitions and the plan of reorganization set out and described therein did not present a feasible method of reorganizing the debtor (this petitioner) and did not adequately or fairly provide for the protection of the rights of the holders of the first mortgage bonds of the debtor or for the realization by them of the value of their interests or liens; that the holders of more than 92 per cent of said bonds (the respondent Glass Companies) had refused to approve or accept said plan, and that said petitions did not comply with the provisions of Section 77-B of the Bankruptcy Act, and therefore were not filed in good faith within the meaning of said Act. It accordingly disapproved and dismissed said petitions. (R. 3).

Petitioner, desiring to appeal from this order, on March 20, 1936, filed its petition for appeal under Section 24(b) of the Bankruptcy Act in the office of the Clerk of the Circuit Court of Appeals for the Fourth Circuit, together with its assignment of errors and other requisite papers, that court then being in

vacation. On the first day of the first term of said court following the filing of said petition, April 6, 1936, petitioner appeared before the court and submitted its petition for such appeal, which the respondents resisted. (R. 10). By its order entered April 15, 1936, (R. 10) the Circuit Court denied the appeal; upon the ground that the order of the District Court dismissing the petitions for reorganization was the equivalent for procedural purposes of a judgment refusing to adjudge petitioner a bankrupt and was reviewable only by appeal under Section 25(a) of the Bankruptcy Act, to be obtained by application to a Judge of the District Court. The Circuit Court held that the methods of review in bankruptcy by appeal under Section 25(a), and by supervisory appeal under Section 24(b) are mutually exclusive, and that the latter cannot be granted in the court's discretion in cases which are reviewable by appeal as of right by the former procedure. *Wayne United Gas Company* v. *Owens-Illinois Glass Company et al.*, (C. C. A. 4th) 83 F. (2d) 98.

Two days thereafter, April 17, 1936, petitioner notified respondents that on April 24th it would present to the District Court its petition praying that the order of March 2, 1936, be vacated and that a rehearing and review of all matters arising in said proceeding be awarded petitioner because of alleged errors committed by the court in dismissing its petitions for reorganization, set forth in an assignment of errors tendered with said petition (R. 4), and that

upon rehearing an order be entered by the District Court awarding petitioner the relief prayed in its original and amended petitions.

By order made April 24, 1936, the District Court directed said petition for rehearing to be filed, and after hearing argument of counsel thereon, took time to consider its judgment. (R. 4). By order entered May 12, 1936, the District Court set aside its order of March 2, 1936, and granted the rehearing and review prayed by petitioner, setting May 22, 1936, for a hearing "on all questions arising on the record." The District Court found "that good cause exists justifying this court in the exercise of a sound judicial discretion in setting aside, vacating and annulling" the order of March 2, 1936, "and in granting to the said Wayne United Gas Company, the above named debtor, a rehearing of all the issues and matters arising in the above styled proceeding upon the alleged errors set forth in the assignment of errors presented with the aforesaid petition and upon the record in this proceeding." (R. 18). The court also found that the debtor's petition and motion to vacate said order of March 2, 1936, and for a rehearing of the matters decided thereby "have been properly and seasonably presented in this cause, and that no rights have become vested under said order * * *" of March 2, 1936, "which will be disturbed by the vacation of said order * * *." (R. 18).

In its order of May 12th, upon motion of respondents, the District Court certified that a regular term

began at Charleston, where the court was sitting, on April 21, 1936. (R. 19).

On May 22, 1936, petitioner, by leave of court, filed its second amended and supplemental petition for reorganization under 77-B (R.25), which incorporated in full its first amended and supplemental petition (R. 26), which latter had incorporated the original petition. Thereupon petitioner moved the court to approve its said petitions, to find that they were filed in good faith and in compliance with the requirements of Section 77-B, *and to set a day for a hearing upon the plan of reorganization which petitioner would then submit to the court*, to be substantially as set out in its second amended and supplemental petition. (R. 21). The respondents appeared and resisted petitioner's motion upon this rehearing.

By order entered May 28, 1936, (R. 19-24) the District Court, after full argument, overruled petitioner's motions and sustained respondents' objections to said petitions and disapproved and dismissed the same for reasons expressed in numerous findings of fact and law made by the court, contained in said order. (R. 21).*

---

* Petitioner objected to most of these findings upon the ground, among others, that they dealt with and decided matters which could be presented and developed only upon a hearing upon the plan of reorganization outlined in its second amended petition, provided for by Subd. (c) of Sec. 77-B, and that such findings were not warranted by the record as then constituted, or proper at the stage of the proceedings in this cause then before the Court. (R. 24).

June 11, 1936, petitioner's petition to the Judge of the District Court for an appeal under Section 25(a) of the Bankruptcy Act from said decree of May 28, 1936, to the Circuit Court of Appeals for the Fourth Circuit, with supersedeas, was granted by the Judge of the District Court and duly perfected. (R. 62).

On July 1st the motion of the appellees, Owens-Illinois Glass Company and others (the respondents here), to dismiss said appeal was argued before the Circuit Court, which by decree entered July 4th sustained the motion and dismissed the appeal (R. 60), upon the ground that the District Court was without *power* to grant a rehearing and set aside the order of March 2nd after the expiration of the thirty-day period allowed for appeal from that order by Section 25(a) of the Bankruptcy Act, and that the order appealed from of May 28, 1936, as well as the order of May 12, 1936, which set aside the order of March 2nd, was therefore void. Per Curiam opinion (R. 58); *Wayne United Gas Company* v. *Owens-Illinois Glass Company et al.*, (C. C. A. 4th) 84 F. (2d) 965.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

(1) In holding that the District Court was without power to grant a rehearing and set aside its order of March 2, 1936, after the expiration of the period allowed for appeal from that order; and in consequence thereof in further holding,

(a) That the order of the District Court appealed from, entered May 28, 1936, upon rehearing, as well as that court's order of May 12, 1936, setting aside its order of March 2nd, was void;

(b) That the effect of these orders was merely to extend the time for appealing from the order of March 2nd;

(c) That petitioner's appeal from said order of May 28th should be dismissed as though it had been taken from the order of March 2nd; and

(d) That the cases cited in its opinion furnish authority for such procedure.

(2) In dismissing said appeal.

SUMMARY OF ARGUMENT

The question is narrow and a summary of the argument is contained in the Subject Index, ante, page I.

ARGUMENT

I.

A FEDERAL DISTRICT COURT HAS POWER TO SET ASIDE A FINAL JUDGMENT OR DECREE WHICH IT HAS MADE AND TO GRANT A REHEARING AFTER THE EXPIRATION OF THE PERIOD ALLOWED FOR APPEAL THEREFROM.

In cases at law or in equity the only limitation upon this power is that it must be exercised, or applcation for rehearing made, during the term at which such judgment or decree was entered.

It is clear, we submit, under the federal decisions that an unsuccessful litigant in a district court may exercise either of two rights to obtain a review of its judgment or decree against him: (1) He may appeal to the proper appellate court, usually the circuit court of appeals, within the time prescribed by the appropriate federal statute for such appeal; or (2) he may apply to the district court which made the judgment or decree of which he complains to set it aside and grant him a rehearing, within the period prescribed by appropriate rules of practice or decisions of the federal courts for such review.

The limitation imposed by law for taking the one or the other of these two courses is not the same. It has long been settled that a party seeking review of either a judgment at law or a decree in equity may for good cause shown have such judgment or decree set aside

and a new trial or rehearing of the matters adjudicated thereby granted him by the district court after the period of three months from the entry thereof prescribed by the federal statute for appeal to a circuit court of appeals (Act of February 13, 1925, c. 229, sec. 8(c), 43 Stat. 940; 28 U. S. C. A. Sec. 230) has expired, provided application is made to the district court and entertained by it at the same term at which such judgment or decree is entered. Equity Rule 69; *Memphis* v. *Brown*, 94 U. S. 715, 718. This right is "in no way controlled by the fact that the time for appeal has expired." *Northwestern P. S. Co.* v. *Pfeifer*, (C. C. A. 8th) 36 F. (2d) 5, 8. If the district court, in the exercise of a sound discretion, grant the application to review its own order and to this end sets aside such order, its judgment or decree made upon the rehearing becomes the final order in the case, and the time for taking an appeal runs not from the date of the original order, but from the date of entry of the order made upon rehearing. *Aspen Mining Co.* v. *Billings*, 150 U. S. 31, 36; *Clarke* v. *Hot Springs Electric L. & P. Co.*, (C. C. A. 10th) 76 F. (2d) 918, 921. A party who permits the time for appeal to expire before applying to the district court for rehearing, even though this be done within the term, takes the risk of losing all remedy by appeal; for if the district court, in its discretion, deny his motion (at law) or his petition (in equity) for a new trial or a rehearing, no appeal lies from its order. *Roemer* v. *Neumann*, 132 U. S. 103, 106; *Kingman & Co.* v. *Western Mfg. Co.*, 170 U. S. 675,

680. And the mere filing of the motion or petition, after the time for appeal has expired, does not toll the limit prescribed by statute for taking the appeal. *Chicago M. & St. P. Ry. Co.* v. *Leverentz*, (C. C. A. 8th) 19 F. (2d) 915, 917. The Circuit Court of Appeals for the Eighth Circuit, in the case last cited, in dismissing an appeal taken from an order of the district court *denying a new trial*, made after the expiration of three months from the entry of its final judgment, quoted with approval the following holding of the district court sustaining the power of that court to entertain a motion for rehearing after the time for appeal had expired:

> "Notwithstanding a defeated party may have lost the right to bring error, he may, under the rules, still have the right within the term to make a motion for a new trial, and to have the benefit of the court's judgment thereon. If the court shall grant the motion, a new trial will follow. If the court shall deny the motion, there is no remedy. The privilege of presenting a motion for a new trial and of having it heard and determined on its merits, *even after the time within which to sue out a writ of error has expired, is a valuable right.* There is no authority for denying it in this case. The motion for a new trial should, therefore, be considered on its merits."[a]

And in *Clarke* v. *Hot Springs Electric L. & P. Co.*, *supra*, the Circuit Court of Appeals for the Tenth Cir-

[a] All italics in this brief are ours.

cuit, considering a petition for rehearing that had been filed in the district court after the time for an appeal had expired and had been allowed in part, said (page 921):

> "* * * A petition for rehearing cannot resurrect a right of appeal which has expired. If filed within the term, *even after the time for appeal has expired*, the trial court may grant it, thus vacate the decree, and start again. But if the rehearing is denied, the original decree stands, and the rights of appeal is not revived. All this has been carefully spelled out by the courts." (Citing *Conboy* v. *First Nat'l Bank*, 203 U. S. 141, and other authorities).

In *Northwestern Public Service Co.* v. *Pfeifer*, *supra*, a motion for a new trial was made more than three months after the judgment was entered, but during the judgment term. The motion was overruled and the new trial denied by an order entered after the judgment term had ended. An appeal was taken from this order denying the new trial. Following the Leverentz case, the Circuit Court of Appeals for the Sixth Circuit again clearly recognized the power and jurisdiction of the district court to entertain the motion for the new trial after the time for an appeal had expired. It said:

> "This motion was 'entertained' by the trial court as it heard arguments and ruled thereon. Also the motion was 'seasonably filed' (being within the judgment term) *insofar as giving the*

trial court jurisdiction to consider and to act thereon." (p. 7).

And further:

> "Appellant had a right during the judgment term to file such motion. *Payne* v. *Garth*, 285 F. 301. This right was in no way controlled by the fact that the time for appeal had expired." (p. 8, citing the Leverentz case).

The court thus summarized the differing consequences of a rehearing applied for before the time for appeal has expired and an application made after the expiration of such period in *Larkin Packer Co.* v. *Hinderliter Tool Co.*, (C. C. A. 10th) 60 F. (2d) 491, 493:

> "Where a motion for a new trial or a petition for rehearing is a matter of right, time is tolled by the filing thereof. *Kingman* v. *Western Mfg. Co.*, 170 U. S. 675, 18 S. Ct. 786, 42 L. Ed. 1192; *Payne* v. *Garth*, (C. C. A. 8) 285 F. 301. *Where not a matter of right, or where the petition is informal, time is tolled if the court considers or entertains the petition.*"

Upon the authority of the decisions above referred to, the District Court for the Eastern District of Virginia, in a carefully considered opinion by Judge Chestnut, has recently held that a petition for rehearing filed in an equity case within the judgment term, but after the expiration of the three months allowed for an

appeal, may be considered,—that it was still within the *power* of the court to grant a rehearing. Upon this point the court said:

> "Therefore, irrespective of whether the time for appeal has expired and may not be extended by the filing of this petition and the present disposition thereof (a question not before me and on which I express no opinion), I have felt it proper to consider the petition on its merits, as it is at least discretionary with me to do so. See *Chicago, M. & St. Paul Ry.* v. *Leverentz*, (C. C. A. 8) 19 F. (2d) 915; *Northwestern Pub. Serv. Co.* v. *Pfeifer*, (C. C. A. 8) 36 F. (2d) 5; *Bailey* v. *Crump*, (C. C. A. 4) 41 F. (2d) 733; *Morse* v. *United States*, 270 U. S. 151, 154, 46 S. Ct. 241, 70 L. Ed. 518; *Burnet* v. *Lexington Ice Co.*, (C. C. A. 4) 62 F. (2d) 906."

The District Court, upon consideration of the petition for rehearing, concluded in the exercise of its discretion that it did not make a proper case for rehearing and refused to grant it. *United States* v. *McIntosh*, (D. C.) 3 F. Supp. 715. An appeal was taken from the order denying the rehearing. The Circuit Court of Appeals for the Fourth Circuit, following the well-settled rule in such cases, dismissed the appeal upon the ground that no appeal lies from an order *denying* a petition for rehearing and that the mere filing of the petition after the expiration of the three-month period does not restore the right of appeal. *McIntosh* v. *United States*, (C. C. A. 4th) 70 F. (2d) 507.

It is equally well settled that the rule is different where the rehearing is granted instead of denied. Thus, in overruling a motion to dismiss an appeal, the Circuit Court of Appeals for the Eighth Circuit held in *Todd* v. *Alden*, (C. C. A. 8th) 245 Fed. 462:

> "Where, after an order allowing a claim in bankruptcy, a rehearing is *granted*, the time for taking an appeal is extended, and runs from the time the order is made final."

The *power* or *jurisdiction* of the District Court to set aside its judgment or decree and grant a rehearing after the time prescribed for appeal therefrom has expired, upon timely application, cannot, we submit, reasonably be doubted. This power has frequently been exercised in bankruptcy proceedings, as shown by the cases subsequently cited.

II.

THERE ARE NO TERMS IN BANKRUPTCY.

A district court sitting in bankruptcy may set aside any order made by it and grant a rehearing of the matters adjudicated thereby, provided (1) the application for review is seasonably made, and (2) rights have not become vested under the order which will be disturbed by its vacation.

When Congress passed the first Bankruptcy Act of 1800, it conferred upon the district courts the administration thereof. (2 Stat. 19). This jurisdiction of

the district courts has been continued in the successive Acts of 1841, 1867 and 1898. Since bankruptcy is a purely statutory creation, and fundamentally at variance with common law principles, it was early recognized that many rules of procedure which had their origin in the common law had no application to bankruptcy proceedings. Thus it was early decided that the district courts sitting in bankruptcy knew no terms, and accordingly their power over their own proceedings was unaffected by rules or principles which limited the power of the same courts sitting at law or in equity to review their own orders, to action within prescribed terms of the court.

It does not follow, of course, that no limitation is imposed by federal law upon the power of the district court sitting in bankruptcy to grant rehearings. The limitation, as early stated by this court and consistently followed, is that the rehearing must be granted upon application seasonably made, and that it must appear that rights have not become vested under the order sought to be reviewed which will be disturbed by its vacation. It has never been held, so far as we can find, that application for a rehearing in bankruptcy must be made at the same term of court at which the order sought to be reviewed was entered.

We are concerned here with the narrow question of the power of the District Court to review its order dismissing a "petition for corporate reorganization under Section 77-B of the Bankruptcy Act as amended"

(Opinion of Circuit Court herein, R. 58; 84 F. (2d) 965), after the time for appeal from that order had expired,—and after the term at which the order was entered had ended. In a former opinion in this case rendered April 15, 1936, denying petitioner an appeal under Section 24(b), the same court held that the order of the District Court (of March 2, 1936) dismissing said petition for reorganization is "the equivalent for procedural purposes of a judgment refusing to adjudge petitioner a bankrupt." *Wayne United Gas Co.* v. *Owens-Illinois Glass Co. et al.*, (C. C. A. 4th) 83 F. (2d) 98. The question now under consideration is whether the District Court, sitting in bankruptcy, has *power* to review this order after a new term of court has commenced.

We think the applicable principle was thus stated in *Sandusky* v. *National Bank*, 23 Wall. 289, 293 (1874):

> "A proceeding in bankruptcy from the time of its commencement, by the filing of a petition to obtain the benefit of the Act, until the final settlement of the estate of the bankrupt, is but one suit. The district court, for all the purposes of its bankruptcy jurisdiction, is always open. *It has no separate terms.* Its proceedings in any pending suit are, therefore, at all times open for reexamination upon application therefor in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation."

While this case arose under the Act of 1867, this language has been held to be equally applicable to the present Bankruptcy Act. *In re Lemmon & Gale Co.*, (C. C. A. 6th) 112 Fed. 296, 300; *In re Ives*, (C. C. A. 6th) 113 Fed. 911, 913.

Quoting and applying this language of the Sandusky case, the Court of Appeals for the Second Circuit in *In re Rochester Sanatarium & Baths Co.*, (C. C. A. 2nd) 222 Fed. 22, 26, held:

> "There are no terms of court in bankruptcy, so that an adjudication of bankruptcy, it is held, may be vacated after the expiration of the term wherein it was entered."

The same court in *In re Burr Mfg. & Supply Co.*, (C. C. A. 2nd) 217 Fed. 16, 18, upon a petition to review and revise the action of the district court in setting aside an order confirming a sale and an order confirming a resale held pursuant to the before-mentioned order, attacked upon the ground that the court had no power to set aside the order confirming the sale after the term had ended at which it was entered, held:

> "The confirmation order having been made at one term, and the order vacating it made at another term presided over by another judge we are asked to hold that the court had no power to vacate its order upon the theory that, after the expiration of the term in which an order, judgment or decree is made, errors can be corrected only by an appellate court * * *

> "It is of course true that as a general rule the power of the court to modify its orders expires with the term. But there are no terms in bankruptcy, and the principle which the learned counsel invokes that a court has *no power* to vacate its order other than at the term in which it was granted is inapplicable to the facts of this case,"—quoting the opinion of Chief Justice Waite in the Sandusky case, above.

In *Freed* v. *Central Trust Co.*, (C. C. A. 7th) 215 Fed. 873, it was held that the common law rule that a bill of exceptions must be filed within the term has no application in bankruptcy proceedings. The court, after holding that a writ of error which the district court had awarded Freed, a bankrupt, (to review an order committing him for contempt) should be treated as a petition to revise under Section 24(b) of the Bankruptcy Act, in overruling appellee's motion to strike a bill of exceptions allowed after the judgment term had ended, said:

> "While, at common law, a bill of exceptions must be filed within the term or within such time as may be granted during the term, this rule can have no application in bankruptcy proceedings. The District Court, sitting as a court of bankruptcy, has no terms. * * *" (p. 876).

It is said to be settled law that "an adjudication of bankruptcy may be vacated after the expiration of the term of court wherein entered," for the reason that there are no terms of court in bankruptcy.

In re Ives, (C. C. A. 6th) 113 Fed. 911, 913;
In re Keyes, (D. C. Mass.) 160 Fed. 763, 764;
In re Wright, (D. C. Mass.) 96 Fed. 820.

Compare: *In re Worchester County*, (C. C. A. 1st) 102 Fed. 808, at page 811.

Other authorities for this proposition are collected at Remington on Bankruptcy, Section 502; Id., Sections 1067 and 3859.

It fairly follows, we submit, from the principles announced and applied in these cases that the *power* of a court of bankruptcy to set aside any order made by it in a bankruptcy proceeding is not lost or destroyed by the expiration of the term of court at which the order was made. The power to vacate the order survives the term. Whether the court should exercise the power is to be determined by the exercise of a sound judicial discretion. If it appears that the petitioner has not been guilty of laches,—if his application has been promptly made,—and if it further appears that there has been no change in the situation of the parties affected by the former order which would make it inequitable to set it aside, that is to say, as stated in Sandusky case, if petitioner can make a proper showing of cause for reconsideration of the former order and "rights have not become vested under it which will be disturbed by its vacation,"—the district court may properly set aside any order made by it in the bankruptcy proceeding. The nature of the order sought to be reviewed, whether final or interlocutory,

does not limit or destroy the power of the court. It has the same power to set aside an order denying an adjudication of bankruptcy as one making such adjudication. In both instances the bottom question is not one of power, but of sound judicial discretion.

It is submitted that the action of the District Court in the case at bar is sustained by the doctrine of the Sandusky case and the line of federal decisions which has followed it. Although petitioner's application for rehearing was made after the time for appeal from the court's original order of March 2nd had expired, and within a few days after the term ended, the District Court found: (1) that petitioner's application and motion "have been properly and seasonably presented in this cause," and (2) that "no rights have become vested under said order or decree entered herein on March 2, 1936, which will be disturbed by the vacation of said order or decree" (R. 18).

Neither of these findings has been or can be challenged.

Supplementing the foregoing propositions, it is respectfully submitted:

(1) The decision of the Circuit Court of Appeals for the Fourth Circuit that the District Court, sitting in bankruptcy, had no power to set aside its order of March 2, 1936, and grant a rehearing after the expiration of the period allowed for appeal from that order, is contrary to the weight of authority and in conflict with decisions of the Circuit Courts of Appeals for the Sixth, Eighth and Second Circuits on the same matter and to the rule recognized in the Third Circuit.

The Circuit Court has decided an important question of federal practice in a way in conflict with applicable decisions of this Court.

1. *West* v. *McLaughlin's Trustee,* (C. C. A. 6th) 162 Fed. 124, 125.

In this case a rehearing was granted by the District Court after the time for appeal from a final order, under Section 25(a) of the Bankruptcy Act, had expired. The District Court upon the rehearing reached the same conclusion it had reached upon the former hearing, and for the second time entered an order approving the finding of the referee disallowing West's claim against the bankrupt estate for $5,000.00. An appeal was taken from the order entered upon the rehearing. The Circuit Court of Appeals overruled appellee's motion to dismiss the appeal and heard the case upon the merits, reversing the decree of the District Court. After stating that it could not accept the contention sustained by some decisions[*] that it would not be an *abuse of the discretion* of the District Court to set aside an order for the *sole purpose* of extending the time for an appeal, the Circuit Court of Appeals

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[*] There is substantial authority for the proposition that a District Court may set aside its order and grant a rehearing for the sole purpose of restoring a right of appeal which has been lost without culpable neglect by expiration of the period limited for taking it. *Stickney* v. *Wilt,* 23 Wall. 150, 164; *Memphis* v. *Brown,* 94 U. S. 715, 718; *In re Hudson Clothing Co.,* (D. C. Me.) 140 Fed. 49, 50; *In re Wright,* (D. C. Mass.) 96 Fed. 820; *In re American S. S. Nav. Co.,* (D. C. Pa.) 14 F. Supp. 106, affirmed in *Cooper* v. *Rauch,* (C. C. A. 3rd) 82 F. (2nd) 1005; Remington on Bankruptcy, Sec. 1069.

held it to be settled law that the District Court had the power, in the exercise of a sound judicial discretion, to set aside its orders in bankruptcy "even after the expiration of ten days" then allowed for appeal therefrom by Section 25(a) of the Bankruptcy Act. Continuing, it said:

> "The record shows that it was not a mere proposition to evade Section 25(a) that induced the court below to set aside its order in this instance, but that it was done in order to have further investigation, and the learned judge of the District Court not only reaffirmed the questions involved, but more elaborately stated his views thereon. *The fact that he again arrived at the same conclusion did not neutralize his power to grant the rehearing, though some concession to the supposed hardship of the case may have had weight with him.* Having reached the conclusion that there was no abuse of the court's discretion in granting the rehearing, the motion to dismiss the appeal will be denied."

The same essential facts stated in the above quotation from the West case are present here. It is certainly true in the case at bar that the judge of the District Court "more elaborately stated his views" upon the rehearing of May 28th than upon the original hearing of March 2nd. It is as true here as in the West case that "the fact that he (the District Judge) again arrived at the same conclusion" upon the rehearing as upon the original hearing "did not neutralize his power to grant the rehearing." It is, of course, as

impossible here as it was in the West case to negative the argument that "some concession to the supposed hardship of the case may have had weight with him." But granting this, there is ample justification here, as there, for holding "that there was no abuse of the court's discretion in granting the rehearing."

The same court in *In re Ives*, (C. C. A. 6th) 113 Fed. 911, 913, upon a motion to vacate a voluntary adjudication of bankruptcy made several terms after the order of adjudication had been entered, held that the rule that orders of the court pass beyond the power of the court to vacate or amend with the end of the term at which they were made, does not apply to orders made in bankruptcy proceedings. The court noted that Section 2 of the Bankruptcy Act contemplates that a court of bankruptcy, like surrogate and probate courts where estates are administered, has no terms. It further held that the rule of this court announced in the Sandusky case, decided under the Act of 1867, is applicable to the current Act of 1898. Its conclusion upon this point was: "We are of opinion, therefore, that the question presented by the petition was open and the court below had power to determine it, although several terms of the district court had expired since the adjudication."

2. *Cameron* v. *National Surety Co.*, (C. C. A. 8th) 272 Fed. 874, 875.

The District Court, on July 1, 1920, set aside its order entered May 17, 1920, adjudging appellant a

bankrupt upon motion made after the time for taking an appeal from the original order (then ten days) had expired. In overruling a motion to dismiss the appeal the court said:

> "* * * The petition to vacate the order of May 17, 1920, was filed June 1, 1920. It is therefore claimed that, the petition to vacate not having been filed within the time allowed for an appeal from the first order, and the *order appealed from being the same as the first order*, the time for taking an appeal had expired when the present appeal was taken. We think that this contention is unsound, in view of the record before us. The order of June 1, 1920, provided that the order of May 17, 1920, 'be and the same is hereby in all things set aside.' The order of August 19, 1920, from which the appeal was taken, does not affirm the order of May 17, 1920, nor refer to it, but is an independent order made upon the pleadings and proofs; so we are of the opinion that on the record as it stands, the order appealed from was the only order in existence and that the time for taking an appeal ran from its date. The appeal was allowed August 20, 1920. The order vacating the first order was not appealed from and is conclusive on this appeal. *We therefore have jurisdiction. Todd* v. *Alden*, 245 Fed. 462, 157 C. C. A. 624."

The District Court in this case held that the appellant, who was the widow of a deceased partner, was a member of the partnership and adjudged the part-

nership and all of its members bankrupt. The Circuit Court, after overruling the motion to dismiss the appeal, considered the case upon the merits and modified the order of the District Court so as to exclude the appellant from the partnership.

3. *In re Rochester Sanitarium & Baths Co.*, (C. C. A. 2nd) 222 Fed. 22, 26.

Here the Circuit Court of Appeals for the Second Circuit, upon petition to superintend and revise an order granting a rehearing entered long after the time for appealing from the original order had expired and after the term of court at which it was entered had ended, noting that the power to vacate judgments is inherent in courts of general jurisdiction, said:

> "But the power is to be exercised by the court which rendered the judgment, and none other can take cognizance of the application. And a motion to set aside a judgment is addressed to the sound legal discretion of the court, and its determination of the matter is not disturbed on appeal *unless it is plain that its discretion has been abused.* The greater power includes the less, and the common-law rule is that a court has entire control over its own orders, and may vacate them at any time during the term at which they are made. (Citing authorities). There are no terms of court in bankruptcy, so that an adjudication of bankruptcy, it is held, may be vacated after the expiration of the term wherein it was entered." (Quoting the language

of the Sandusky case, quoted at page 17 hereof, ante).

To the same effect is:

Todd v. *Alden*, (C. C. A. 8th) 245 Fed. 462, *supra.*

4. It is held in the Third Circuit not only that a federal district court sitting in bankruptcy has general power to grant a rehearing and upon such rehearing to vacate, modify or reaffirm its prior decree after time for taking an appeal has expired and the term at which the decree was entered has ended (upon the authority of the Sandusky case), but also that the granting of a rehearing for the purpose of reviving a right of appeal, where the petitioner has some excuse for not having taken it within the statutory period, is a valid exercise of the discretion vested in the court to grant a rehearing. *In re American S. S. Nav. Co.*, (D. C. E. D. Pa.) 14 F. Supp. 106, 108. After granting the rehearing, the District Court entered an order reaffirming its original decree, which had overruled the referee and allowed the claim of a creditor, Rauch. Upon appeal from the order entered upon the rehearing, the Circuit Court of Appeals for the Second Circuit affirmed the District Court in a *per curiam* opinion. *Cooper* v. *Rauch*, (C. C. A. 2nd) 82 F. (2d) 1005.[5]

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[5] A prior appeal taken by the petitioner in this cause after the statutory period had elapsed by the reentry nunc pro tunc of the order overruling his objections to the claim of Rauch had been dismissed by said Circuit Court of Appeals. (14 F. Sup. at p. 108).

5. It is submitted that the action of the Circuit Court of Appeals in the case at bar is in conflict with the ruling of this court in *Zimmern* v. *United States*, . . . U. S. . . ., 80 L. ed. 742, in which this court reviewed and reversed a ruling of the Circuit Court of Appeals for the Fifth Circuit in order to avoid confusion upon a related question of practice.

The District Court in the Zimmern case, which was a proceeding in equity to cancel certain deeds, extended a term of the court for the avowed purpose of modifying or amending its final decree. One of the defendants filed a petition for rehearing when the time to appeal had already gone by, if the original decree was then presently in force (p. 743). The Circuit Court dismissed the appeals upon the ground that

> "Motion for rehearing filed in trial court *after expiration of three months from final decree came too late*, and was ineffective to extend time for taking appeal." *Zimmern* v. *United States*, (C. C. A. 5th) 79 F. (2d) 703.*

In reversing the Circuit Court, this court said that under the applicable statute (U. S. C. A., Title 28, Sec. 230) the appeals of the defendants were too late if the time is to be computed from the date of the decree as originally entered, but they were regular if the time is to be computed from the date of the argument, adding:

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* Rehearing denied, 80 F. (2d) 993.

"The judge had plenary power while the term was in existence to modify his judgment for error of fact or law, or even revoke it altogether."

(2) It is respectfully submitted that the decisions cited by the learned Circuit Court of Appeals for the Fourth Circuit do not sustain its proposition "that the court below was without power to grant a rehearing and set aside the order of March 2nd after the expiration of the period allowed for appeal from that order." (Opinion, R. 58).

Three cases are referred to as sustaining this holding, namely:

1. *United States* v. *East*, (C. C. A. 8th) 80 F. (2d) 134, 135.

In this case some three months after the claim of the Government against the bankrupt's estate for taxes had been denied by the District Court, the Government filed a petition to review the order denying its claim on the ground that a rehearing was necessary to enable it to take an appeal in the event it should decide to do so. The Government's petition was presented *ex parte* and granted the same day it was tendered. The District Court in its order made the finding that "on January 13, 1913, upon petition filed on that day, the court granted a rehearing *for the purpose of enabling the United States of America to perfect an appeal to the Circuit Court of Appeals.*" By the same order the

District Court again disallowed the claim of the United States against the bankrupt. Upon this record the Circuit Court of Appeals for the Eighth Circuit dismissed the appeal taken by the Government from the order of January 13, 1913, holding that the purpose of the proceeding was an ineffectual effort to extend the time for an appeal.

This record is essentially different from the record in the instant case. So far from the record here showing that the rehearing was granted by the District Court for the sole purpose of enabling petitioner to perfect an appeal, the record is that the rehearing was granted in order to enable the court more fully to consider the correctness of its former decision upon difficult questions in the light of the assignments of error specifying errors complained of by petitioner.

In the East case the order granting the rehearing was made *ex parte* without argument of counsel and without any reason being assigned by petitioner or considered by the court except the Government's necessity that the former order be set aside and reentered in order to enable it to take an appeal. This is not the case disclosed by the present record. It is submitted that the instant case is ruled not by the East decision, but by the decision of the same court (C. C. A. 8th) in *Cameron* v. *National Surety Co., supra.*

2. *Bonner* v. *Potterf*, (C. C. A. 10th) 47 F. (2d) 852, 855.

The point ruled in this case is not that the trial judge lacked power to grant a rehearing after the expiration of the appeal period, but that his action was "beyond the sound discretion of the court."

On January 17, 1929, the District Court entered an order overruling Bonner's exception to the report of a referee denying his claim against the bankrupt's estate. On March 28th, after the thirty-day period for appeal had expired, Bonner filed a petition to reopen the case, which also asked the court to reenter its final order of January 17th so that in the event the court should hold against his contention, he might appeal from that judgment to the Circuit Court of Appeals (p. 853). The District Court denied the petition for rehearing, but directed the reentry of its original order. This was done on November 6th and an appeal therefrom taken the same day. The District Court made the following finding:

> "I find that the motion of W. M. Bonner to reopen this case should be overruled and an order to that effect will be entered at Muskogee on November 6, 1929. The order of January 17, 1927, overruling exceptions will be reentered on November 6, 1929, (so) as to give Bonner opportunity to appeal the test question as to whether it is final order, etc., and seek a review on order of court overruling exceptions." (p. 853).

In sustaining a motion to dismiss the appeal from this order, the Circuit Court held that it conclusively appeared from the record that the trial judge merely attempted to reenter the original order for the purpose of allowing an appeal from it, the new order incorporating the old one, and that it did not appear that the trial judge in any way reconsidered his former action in making the new order. Its conclusion was:

> "It is therefore apparent that this action of the court was simply a reentry of the original order for the sole purpose of saving the rights of the appellant in regard to appeal which, under such circumstances, *is a matter beyond the sound discretion of the court, and amounts to an ineffective gesture to revive the right to appeal.*" (p. 855).

It is noteworthy that the Circuit Court, in discussing the applicable legal principle, quotes with approval the holding of the Circuit Court of Appeals for the Sixth Circuit in *West* v. *McLaughlin's Trustee* (ante p. 22) that a court has the power "even after the expiration of the time within which to appeal, in the exercise of its sound discretion, (to) grant a rehearing" (p. 854). It is clear that the decision in this case turned not upon the lack of power in the District Court to grant a rehearing, but on an abuse of its discretion in the exercise of that power under the facts of the case.

3. *In re Stearns & White Co.*, (C. C. A, 7th) 295 Fed. 833.

Here the bankrupt, Stearns & White Co., on April 12th, moved the District Court to vacate orders entered by it on February 3rd and 28th allowing a claim against it for approximately $17,000.00 in favor of a creditor, Lee. The motion was made for the express purpose of reinstating the right of appeal from said orders, which had been lost by failure of the bankrupt to perfect an appeal which had theretofore been duly prayed and allowed (p. 834). The court by an informal *ex parte* order entered on the same day, April 12th, vacated its two prior orders, again denied the bankrupt relief, and again affirmed the action of the referee allowing Lee's claim. This action was taken solely for the purpose of restoring the right to appeal. This appears clearly from the District Court's order of April 12th, reading as follows:

> "Orders of February 3d and 28th vacated—petn. of Stearns & White to review order of F. L. Wean, Referee, of July 11, 1922, denied—order of Referee affirmed." (p. 834).

The record in the Stearns & White case was substantially the same as that in the East and Bonner cases. In all three the record showed that the rehearing was applied for and granted *ex parte*, without consideration of the merits of the motion or the possibility of error in the court's former order, for the sole purpose of restoring a lost right of appeal.

However in the Stearns & White case the court, in dismissing the appeal, went further than was necessary to the decision of the question presented and said that the District Court was without "jurisdiction" to grant the rehearing,—instead of grounding its judgment upon an erroneous exercise of discretion by the District Court in granting the rehearing, as in the East and Bonner cases. In this respect the learned court, it is submitted, proceeded upon a misconception of the holding of this court in *Conboy* v. *First National Bank*, 203 U. S. 141, by saying:

> "The Conboy case very conclusively holds that where there is no petition for rehearing or other action taken within the time allowed for the appeal, nothing done thereafter can be of any avail." (p. 840).

All that the Conboy case decided was that the *mere filing* in a Circuit Court of Appeals of a petition for rehearing which was *denied* did not extend the time for taking an appeal to this court from the order of the Circuit Court sought to be reviewed. By waiting until after the time for appeal had expired before applying for the rehearing, the petitioner took the risk of losing his right of appeal. If his petition for rehearing had been granted, the former order against him would have been superseded by the order granting the rehearing and the time for appeal would have run from the entry of the latter under authorities hereinbefore cited (ante, p. 15 et seq.). But where the petition for re-

hearing was denied (which was the result in the Conboy case), two consequences followed: (1) No appeal could be taken from the order denying the rehearing because the allowance thereof was discretionary with the Circuit Court of Appeals to which the application was addressed; and (2) the mere application for a rehearing did not enlarge the time for taking an appeal from the original order. That this is the substance of the ruling in the Conboy case appears from the court's holding therein:

> "No appeal lies from orders *denying* petitions for rehearings which are addressed to the discretion of the court and designed to afford it an opportunity to correct its own errors." (203 U. S. at p. 145).

The court in the Conboy case declined to decide what would have been the effect upon petitioner's right to appeal if his petition for rehearing had been *granted.* That it deliberately left this question open appears from the final paragraph of its opinion:

> "The petition was denied. Whether it could have been granted in view of the terms and spirit of the Bankruptcy Act, or the effect, if it had been, we are not called upon to discuss." (203 U. S. at p. 146).

There are a number of decisions which correctly apply the doctrine of the Conboy case by holding that no appeal lies from an order of the District Court

denying a motion to vacate a prior order and grant a rehearing where the motion is made after the time limited for taking an appeal from the first order has expired.[e] All these cases proceed upon the principle that if a party permit the time limited for his appeal to expire before moving to vacate the adverse order, the mere filing of his petition does not resurrect a dead right of appeal, and if the motion be denied, no appeal lies from the order denying the rehearing. This is not the situation presented by the record in the instant case.

The court in the Stearns & White case also expressed the opinion that the ruling in the Sandusky case, decided under the Act of 1867, is not applicable to cases arising under the Act of 1898 because of what it regards as important differences in the provisions of the two Acts. This is not the view taken by other Circuit Courts of Appeals. *In re Lemon & Gale Co.*, (C. C. A. 6th) 112 Fed. 296, 300; *In re Ives*, (C. C. A. 6th) 113 Fed. 911, 913.

There is no discussion of terms of court in the Stearns & White opinion. The holding of the court is that in no event can a petition for reconsideration of an order of the court allowing a claim against the

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[e] These include such cases as *Morgan* v. *Benedum*, (C. C. A. 4th) 157 Fed. 232; *McIntosh* v. *United States*, (C. C. A. 4th) 70 F. 507; *Rode & Horn* v. *Phips*, (C. C. A. 6th) 195 Fed. 414; *Ewing* v. *Russell Hdwe. Co.*, (C. C. A. 8th) 287 Fed. 545; *Foster* v. *McMasters*, (C. C. A. 8th) 15 F. (2nd) 751.

estate of a bankrupt be considered unless a petition for reconsideration has been filed within ten days after the entry of the order, except in the single case provided for by Section 57(k) of the Bankruptcy Act, allowing a reconsideration for cause.[7] If, as our adversaries argue, the ratio decedendi can be extended to embrace all other orders entered by the bankruptcy court, then this holding is in direct conflict with the numerous decisions hereinbefore cited.

In the *American S. S. Nav. Co.* case, ante, the court reviewed at some length the authorities dealing with the question of its power to grant a rehearing after the time for appeal had expired and the judgment term had ended, reaching the conclusion that there was no doubt as to this power, upon the authority of the Sandusky case, and saying that it knew of no decision except the Stearns & White case denying this power:

> "Some of the cases cited above (*In re Hudson Clothing Co.*; *West* v. *W. A. McLaughlin Co.'s Trustee*) hold that discretion to grant a rehearing for the purpose of reinstating a lapsed right of appeal may be abused, but none of them except *In re Stearns & White Co.* deny the jurisdiction." (14 F. Supp. at p. 109).

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[7] Section 57(k) of the Bankruptcy Act provides: "Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed."

(3) The District Court set aside its order of March 2, 1936, in the exercise of a sound judicial discretion and for good cause shown.

The District Court did not act upon petitioner's application without the benefit of full argument and after mature consideration. On April 24th, after due notice to respondents, petitioner filed its petition to set aside the order of March 2nd "because of error in said order or decree upon the grounds set forth in the assignment of errors presented herewith and attached hereto" (R. 7). This assignment of errors, found at pages 14-17 of the Record, points out specifically numerous respects in which petitioner conceived the District Court erred in holding that its petitions did not comply with the provisions of Section 77(b) of the Bankruptcy Act and were not filed in good faith within the meaning of said Act and in disapproving and dismissing said petitions. The court found, as set forth in its order made three weeks later, May 12th,

> "that good cause exists justifying this court, in the exercise of a sound judicial discretion, in setting aside, vacating and annulling the aforesaid order or decree entered by this court in the above styled proceeding on the 2nd day of March, 1936, and in granting to the said Wayne United Gas Company, the above named Debtor, a rehearing of all the issues and matters arising in the above styled proceeding *upon the alleged errors set forth in the assignment of*

errors presented with the aforesaid petition, and upon the record in this proceeding."[9]

Argument of the questions arising upon the rehearing was set by the same order for May 22nd. On that day the petitioner filed its second amended and supplemental petition for reorganization, amending its former plan in important respects more favorable to the first mortgage bondholders. The hearing on May 22nd, as shown by the order of the court entered thereon on May 28th, was in no sense perfunctory or merely formal. The court then had before it for the first time the amendments made by the Debtor's second amended and supplemental petition.[10] This order shows (R. 19)

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[9] The Circuit Court of Appeals for the Seventh Circuit has recently held, In re Georgian Hotel Corporation, 82 F. (2d) 917, 920 (March 31, 1936), that the fact that a receivership suit was pending in a state court, which had rendered a decree of foreclosure, did not deprive the bankruptcy court of jurisdiction of a reorganization proceeding under Section 77-B.

[10] No plan of reorganization was submitted with the Debtor's original petition filed November 25, 1935, which is found at pages 26-31 of the Record. In its amended and supplemental petition filed December 10, 1935, the Debtor undertook "promptly and within any reasonable time fixed by the court" to propose a plan of reorganization which in substance would provide for: immediate payment in cash of all arrears in interest and sinking fund payments and curing all defaults under the first mortgage; setting aside the acceleration of maturity of the first mortgage bonds (the due date of which was June 1, 1944), and remitting the first mortgage bondholders to their former position under the mortgage, without change; the payment of all taxes, fees and expenses of the receivers, costs of reorganization, etc.; providing such amount for working capital of the reorganized company as the court should deem necessary; cancellation of the second or general mortgage; exchange of the 7% gold notes of the company, which were secured by the general mortgage bonds, for 6% debentures or notes maturing subsequent to the first mortgage bonds, with no provision for sinking fund and with interest payable out of net earnings remaining after the requirements of the first mortgage and other specified

that the court went thoroughly and carefully into the merits of petitioner's motion to reverse its former action and approve its petitions. It made ten separate findings of law and fact in response to petitioner's assignment of errors in its former order. The court's conclusion, in view of its findings, was "to dismiss the Debtor's several petitions." It stayed the effect of its order for thirty days to enable the Debtor to appeal therefrom. The instant appeal was taken and perfected well within the thirty-day period, namely, on June 11, 1936 (R. 62).

It is submitted in these circumstances that the fact that the District Court upon rehearing reached the same ultimate conclusion that it had reached upon its former hearing on March 2nd does not destroy its power or jurisdiction to grant the rehearing. (*West* v. *McLaughlin's Trustee*, (C. C. A. 6th) 162 Fed. 124, 125, ante, p. 23).

Whether the District Court was right in its findings made and order entered upon the rehearing is a question not now presented. The sole question now before

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obligations of the company were fully met. This plan is found at pages 36-39 of the Record. The second amended and supplemental petition, tendered May 22nd, contained proposed amendments to the suggested plan, distinctly more favorable to the first mortgage bondholders, by providing for the waiver of a provision of the first mortgage for cumulating deductions from net earnings for capital expenditures, and by providing for applying the unused balance in any year for the benefit of the first mortgage bondholders; and by still further subordinating the payment of both principal and interest of the new money to the rights of the first mortgage bondholders.

this Court, upon the present writ, is whether the District Court had the power to grant the rehearing.

CONCLUSION

It is submitted that the Circuit Court of Appeals for the Fourth Circuit by its decision in the instant case has narrowed the power of the District Judge by imposing limitations, not recognized in other circuits, inconsistent with long established and widely recognized rules of federal procedure which have been approved by this court.

The decree should be reversed.

Respectfully submitted,

FRED O. BLUE,
ROBERT S. SPILMAN,
Counsel for Petitioner.

APPENDIX A

Sections 24 and 25, as amended, of the Bankruptcy Act of 1898, providing for appellate jurisdiction of controversies arising in bankruptcy proceedings and for appeals in proceedings in bankruptcy, are as follows:

"*Sec. 24.* (11 USCA Sec. 47). *Same (Jurisdiction); Appellate Jurisdiction.—a.* The Supreme Court of the United States, the circuit courts of appeal of the United States, the Court of Appeals of the District of Columbia, and the supreme courts of the Territories, in vacation, in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.

"*b.* The several circuit courts of appeal and the Court of Appeals of the District of Columbia shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law (and in matter of law and fact the matters specified in section 25) the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised by appeal and in the form and manner of an appeal, except in the cases mentioned in said section 25 to be allowed in the discretion of the appellate court.

"*c.* All appeals under this section shall be taken within thirty days after the judgment, or order, or other matter complained of, has been rendered or entered. (30 Stat. 553 (1898), as am'd, 43 Stat. 936, 937, 941 (1925), as am'd, 44 Stat. 664 (1926).)

"*Sec. 25.* (11 USCA Sec. 48). *Appeals and Writs of Error.—a.* Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeal of the United States and the Court of Appeals of the District of Columbia, and

to the supreme courts of the Territories, in the following cases, to-wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within thirty days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

"*b.* Trustees shall not be required to give bond when they take appeals or sue out writs of error.

"c. Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws in force on July 1, 1898, or such as may be thereafter enacted. (30 Stat. 553 (1898), as am'd, 43 Stat. 936, 941 (1925), as am'd, 44 Stat. 665 (1926).)"

APPENDIX B

Relevant parts of Section 77-B (Act of June 7, 1934, 48 Stat. 911, 912, c. 424, 11 USCA Sec. 207), are:

(Petition)

"*Sec. 77-B.* (11 USCA Sec. 207). *Corporate Reorganizations.*—(a) Any corporation which could become a bankrupt under section 4 of this Act * * * may file an original petition, or, before adjudication in an involuntary proceeding, an answer, * * * stating the requisite jurisdictional facts under this section; the nature of the business of the debtor; in brief description, the assets, liabilities, capital stock, and financial condition of the debtor; if a prior proceeding is pending, the name of the court in which it is pending and the nature of such proceeding; facts showing the need for relief under this section; and that the corporation is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. * * * Upon the filing of such a petition or answer the judge shall enter an order either approving it as properly filed under this section if satisfied that such petition or answer complies with this section and has been filed in good faith, or dismissing it. * * *

(Plan)

"(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character or otherwise; (3) shall provide for the payment in cash of all costs of administration and other allowances made by the court except etc. * * * (4) (relates only to stockholders); (5) shall provide in respect of each class of creditors of which less than two-thirds in amount shall accept such plan (unless the claims of such class of creditors will not be effected by the plan, or the plan makes provision for the payment of their claims in cash in full), provide adequate protection for the realization by them of the value of their interests, claims, or liens, if the property affected by such interests, claims,

or liens is dealt with by the plan, either as provided in the plan (a) by the transfer or sale of such property subject to such interests, claims, or liens, or by the retention of such property by the debtor subject to such interests, claims, or liens, or (by sale or appraisal or other method approved by the judge) * * *; (9) shall provide adequate means for the execution of the plan, which may include * * * the retention of the property by the debtor, the distribution of assets among creditors or any class thereof, the satisfaction or modification of liens, indentures, or other similar instruments, the curing or waiver of defaults, extension of maturity dates of outstanding securities, the change in interest rates and other terms of such securities, the amendment of the charter of the debtor, and the issuance of securities of either the debtor or any such corporation or corporations, for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes; * * *

* * * * *

"(10) * * * In the case of secured claims entitled to the provisions of clause (5) of this subdivision (b), the value of the security shall be determined in the manner provided in section 57, clause (h) of this Act, and if the amount of such value shall be less than the amount of the claim, the excess may be classified as an unsecured claim. * * *

(Hearing on Plan)

"(c) Upon approving the petition or answer or at any time thereafter, the judge, in addition to the jurisdiction and powers elsewhere in this section conferred upon him, (1) may, after hearing upon notice to the debtor and to such others as the judge may determine temporarily continue the debtor in possession or appoint a trustee or trustees of the debtor's estate, and shall require the debtor, or such trustee or trustees, if appointed, to give such notice as the order may direct to creditors and stockholders and to cause publication thereof to be made at least once a week for two successive weeks of a hearing to be held within thirty days after such appointment, or, if no such appointment, within thirty days after the approval of the petition or answer, at which hearing or any adjournment thereof, or at any subsequent hearing after notice, the judge may make permanent any such appoint-

ment, or terminate it and restore the debtor to possession, * * * (4) shall require the debtor, or the trustee or trustees if appointed, at such time or times as the judge may direct, and in lieu of the schedules required by section 7 of this Act, to file such schedules and submit such other information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan; * * * (6) * * * and may * * * classify as an unsecured claim, the amount of any secured claim in excess of the value of the security therefor, such value to be determined in accordance with the provisions of section 57, clause (h), of this Act; * * * (8) if a plan of reorganization is not proposed or accepted within such reasonable period as the judge may fix, or, if proposed and accepted, is not confirmed, may, after hearing, whether the proceeding be voluntary or involuntary, either extend such period or dismiss the proceeding under this section * * * (10) may enjoin the * * * continuance of any judicial proceeding to enforce any lien upon the estate until after final decree. * * * Any creditor or stockholder shall have the right to be heard on the question of the permanent appointment of any trustee or trustees, and on the proposed confirmation of any reorganization plan, and upon filing a petition for leave to intervene, on such other questions arising in the proceeding as the judge shall determine. * * *

* * * * *

(Acceptance of Plan by Creditors)

"(e) (1) A plan of reorganization shall not be confirmed until it has been accepted in writing, whether before or after the filing of the petition or answer under this section, and such acceptance shall have been filed in the proceeding by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims have been allowed and would be affected by the plan and by or on behalf of stockholders of the debtor holding a majority of the stock of each class: Provided, however, That such acceptance shall not be requisite to the confirmation of the plan by any creditor or class of creditors (a) whose claims are not affected by the plan, or (b) if the plan makes provision for the payment of their claims in cash in full, or (c) if provision is made in the plan for the protection of the interests, claims, or liens of such creditor or

class of creditors in the manner provided in subdivision (b), clause (5), of this section: * * *

* * * * *

(Confirmation of Plan)

"(f) After hearing such objections as may be made to the plan, the judge shall confirm the plan if satisfied that (1), it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible; (2) it complies with the provisions of subdivision (b) of this section; (3) it has been accepted as required by the provisions of subdivision (e), clause (1) of this section; (4) the provisions of subdivision (e), clause (2) (relating only to utilities), of this section have been complied with; (5) all amounts to be paid by the debtor * * * for service or expenses incident to the reorganization, have been fully disclosed and are reasonable, or are to be subject to the approval of the judge; (6) the offer of the plan and its acceptance are in good faith and have not been made or procured by any means or promises forbidden by this Act; and (7) the debtor, * * * is authorized by its charter or by applicable State or Federal laws, upon confirmation of the plan, to take all action necessary to carry out the plan, * * *.

* * * * *

(Receiverships)

"(i) If a receiver or trustee of all or any part of the property of a corporation has been appointed by a * * * State * * * court, * * * a petition or answer may be filed under this section at any time thereafter by the corporation * * * as provided in subdivision (a) of this section, and if such petition or answer is approved the trustee * * * or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to said property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver, etc. * * *

* * * * *

(Application of other Provisions of Bankruptcy Act)

"(k) * * * All other provisions of this Act, except such as are inconsistent with the provisions of this section 77B, shall apply to proceedings instituted under this section, whether or not an order to liquidate the estate has been entered. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to

'debtors'; 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this section; the date of the order approving the petition or answer under this section shall be taken to be the date of adjudication, and such order shall have the same consequences and effect as an order of adjudication.

* * * * *

"(o) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was approved."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 305

WAYNE UNITED GAS COMPANY,
Petitioner,

v.

OWENS-ILLINOIS GLASS COMPANY ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS WRIT OF CERTIORARI

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TABLE OF CASES

Page

Ammons v. *Ammons*, 50 W. Va. 390 8

Bank v. *Cain*, 107 W. Va. 309 8

Dunfee v. *Childs*, 45 W. Va. 155 8

In re Georgian Hotel Corporation, 82 F. (2d) 917. 9

Illinois Central Ry. Co. v. *Adams*, 180 U. S. 28 9

Male v. *Atchison, etc. Ry. Co.*, 240 U. S. 97 9

Old Colony Trust Co. v. *Seattle*, 271 U. S. 426 9

STATUTE CITED

Code of West Virginia, ch. 58, art. 5, sec. 4 12

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The respondents have moved to dismiss the writ of certiorari upon the ground that the question presented by it is moot, and that by reason of changes in the circumstances of the parties, "and especially of the property of the petitioner", no relief can ultimately be granted the petitioner in the pending litigation to which said writ applies.

In support of their motion they have filed copies of certain decrees entered and papers filed in the cause of John B. Bell et al. v. Wayne United Gas Company et al., pending in the Circuit Court of Kanawha County, West Virginia.[1] It appears from these exhibits filed in support of the motion that it is without merit and should be denied, for the following reasons:

I.

The Glass Companies, which are respondents to the writ of certiorari, notwithstanding that they had submitted themselves to the jurisdiction of the Disrict Court in the proceedings for reorganization therein, instigated and procured the sale of petitioner's properties in the state court, over petitioner's objection and in disregard of the fact that this writ is pending in this court, and at such sale became the purchasers of petitioner's property, using its first mortgage bonds held by them in payment therefor. It appears from the copy of the "Supplemental Decree of Sale" of the Circuit Court of Kanawha County, entered on the 10th day of August, 1936, filed as Exhibit A with the motion to dismiss, that petitioner, Wayne United Gas Company, brought to the attention of the Circuit Court of Kanawha County by suggesting upon the

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1 The majority an minority opinions of the Supreme Court of Appeals of West Virginia in the cause of John B. Bell, et al v. Wayne United Gas Company, et al are reported in 116 W. Va. 280, 181 S. E. 609; the decision of said Supreme Court was by a vote of three to two, two of the five judges holding that the First Mortgage Bonds of the Wayne United Gas Company, held by the Glass Companies, as appellees in said cause, were subject to the equities asserted by the appellants.

record in the Bell suit the facts relating to the filing of its petition in the District Court of the United States for the Southern District of West Virginia for reorganization under Section 77B of the Bankruptcy Act, and the proceedings that had been taken in both the District Court and the Circuit Court of Appeals for the Fourth Circuit upon said petition up to August 10, 1936, including the fact that it intended to apply to this court for a petition of certiorari to review the decree of the Circuit Court dismissing its appeal in the reorganization proceeding; including the fact that the District Court had granted a supersedeas to its decree of May 28, 1936, dismissing the petition for reorganization, which had been perfected on June 11, 1936, (R. 62) and the further fact that the Circuit Court of Appeals, on July 28, 1936, had stayed its mandate pending the application of petitioner to this court for a writ of certiorari (R. 64). It further appears that thereupon petitioner moved the court to direct the Special Commissioners appointed to make the sale of petitioner's property to take no proceedings until this court should act upon petitioner's application for said writ to review the order of the Circuit Court entered on July 4, 1936, dismissing the petitioner's appeal from the order of the District Court entered May 28, 1936, *which motion the Glass Companies resisted.* The Circuit Court thereupon overruled petitioner's motion and directed the Special Commissioners to proceed with the sale of said property, to which petitioner objected and excepted.

It further appears from the copy of the decree of confirmation entered by the Kanawha Circuit Court on October 14, 1936, (Exhibit C with said motion to dismiss) that petitioner on that day filed its written objections to the confirmation of sale of its properties made by the Special Commissioners on October 1, 1936, (Exhibit C) and in support of its objections filed a stipulation between counsel for the Glass Companies and petitioner's counsel (Exhibit C-1). It was thus stipulated:

> (1) That this court, on the 12th day of October, 1936, had granted this writ of certiorari. A printed copy of the transcript of the record upon said writ was filed as a part of the stipulation. Also, that H. G. Phillips, the purchaser of the property sold by the Special Commissioners on October 1, 1936, was vice-president of one of the respondent Glass Companies "and that his bid was made for the defendants, Owens - Illinois Glass Company and Libbey - Owens - Ford Glass Company".
>
> (2) That the petitioner had applied to the Supreme Court of Appeals of West Virginia for an appeal and supersedeas from the Supplemental decree of sale of August 10, 1936, which had not yet been acted upon.
>
> (3) That the property for which Phillips had bid $1,225,500.00 included the sum of $546,726.02 in cash and $18,000.00 in account receivable from the two Glass Companies for gas purchased by them from the Receivers.

Petitioner objected to the confirmation of the sale because of the fact that the decrees of the District Court and of the Circuit Court of Appeals dismissing its petition for reorganization had been superseded and stayed, and the decree of the Circuit Court of Appeals was before this court for review upon the writ of certiorari, as above stated. The respondent Glass Companies nevertheless again moved the court to approve and confirm the sale reported by the Special Commissioners. By its decree entered on the 2nd day of December, 1936, (Exhibit D) the Kanawha Circuit Court overruled petitioner's objections to confirmation of the sale, and confirmed the sale reported by them to Phillips or his assignees, directing the Special Commissioners to execute and deliver deeds and other instruments conveying and assigning to the purchasers the property sold by them. The court set December 8, 1936, as the day for determining allowances to be made for compensation and expenses of the Commissioners, Receivers, Trustees and their counsel. The decree of December 21, 1936, (Exhibit E) shows that such allowances out of said fund (aggregating $564,726.00 in the hands of the Receivers), aggregating $77,274.16, were made by the court over the renewed objections of petitioners. The Special Commissioners were directed to execute a deed for the property sold by them to the Glass Companies as assignees of Phillips, and the Glass Companies were given the right to use petitioner's first mortgage bonds held by them in part payment of the price bid by

Phillips for the property, each bond being assigned a value for such purpose of $767.576. To all this petitioner objected, and moved the court "to defer and postpone all disbursements of the aforesaid moneys and the execution of the aforesaid deed until after the federal courts have finally passed upon the aforesaid proceedings pending therein." The Glass Companies objecting to the motion and insisting upon immediate execution of the decree, the state court overruled petitioner's objections, to which it again excepted.

Thereafter, by deed dated the 17th day of December, 1936, the Special Commissioners and others conveyed petitioner's West Virginia property to the respondents herein, Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, which now hold legal title and ownership thereof. It thus appears that as a result of the proceedings in the state court, the respondent Glass Companies, in disregard of the pendency of this writ in this court, have insisted upon and procured the sale of petitioner's properties embraced in the first mortgage securing petitioner's bonds, and have themselves become vested with the legal title thereto. They now urge their own action as ground for dismissing the writ of certiorari, which this court has granted for the purpose of reviewing the correctness of the decree of the Circuit Court of Appeals in dismissing petitioner's appeal from the order of the District Court, dismissing petitioner's petition for reorganization. They allege in support of this ground

that by their own action they have made it impossible for petitioner to obtain the relief which it seeks by its petition for reorganization. This, we submit, is highly fallacious.

The Glass Companies intervened in petitioner's proceeding for reorganization in the District Court and became parties to it. That proceeding is still pending in the District Court. The Glass Companies are still subject to the jurisdiction of that court, and will be bound by any order which either this Honorable Court or the Circuit Court of Appeals or the District Court may make in or affecting petitioner's proceeding for reorganization. If this court shall reverse the decree of the Circuit Court of Appeals dismissing petitioner's appeal, and it shall be held as a result thereof that petitioner is entitled to reorganization under the provisions of Section 77B of the Bankruptcy Act, in accordance with the prayer of its petitions for reorganization, the Glass Companies will still be before the District Court and subject to such order as it may enter for the purpose of making the reorganization effective. If a trustee be appointed by the District Court, the Glass Companies may be required to deliver to him petitioner's properties which they have thus purchased. The situation is that the Glass Companies now hold the legal title to such property subject to such order as the federal courts having jurisdiction of the matter may make affecting the same. The situation is essentially different from that where

property is sold and passes into the hands of third parties who are strangers to the litigation. It is settled law in West Virginia that where property is purchased at a judicial sale by a party to the suit in which the property was sold, the title of such purchasers is not protected, but fails in the event the decree of sale be reversed. In *Dunfee* v. *Childs*, 45 W. Va. 155, 164, in holding that a West Virginia statute protecting purchasers at judicial sales did not apply to a party to the suit who procured the sale, the court said:

> "The same reason does not exist for protecting him as an innocent third person. He moves the proceeding. Shall they who procure an erroneous decree, and under it get the defendant's property, hold fast to the fruits of that erroneous decision? Must not he make restitution of all he yet has in hand? Justice would say so."

This rule has been repeatedly affirmed by the Supreme Court of Appeals of West Virginia in a line of cases which include

> *Ammons* v. *Ammons*, 50 W. Va. 390;
> *Bank* v. *Cain*, 107 W. Va. 309.

The fact that before the filing of a petition for reorganization under Section 77B, an equity suit has been commenced in a state court to foreclose the lien of the bonds affected by the plan of reorganization, which had progressed to the entry of a foreclosure

decree, does not prevent the bankruptcy court from authorizing reorganization. *In re Georgian Hotel Corp.*, (C.C.A. 7th, 1936) 82 F. (2d) 917. Here the Glass Companies, who voluntarily became parties to the reorganization proceeding in the District Court, have gone a step farther and, pending the reorganization proceeding, have procured the decree of foreclosure to be executed, as a result of which they now hold the properties affected by the reorganization. We submit that they will not be permitted thus to divest the federal courts of jurisdiction and to profit by their own action, in deliberate disregard of the pendency of proceedings to which they are parties in the federal courts.

II.

Under the applicable decisions of this court, the proceedings in the state court, upon which petitioner's motion to dismiss is grounded, go to the merits and will not be considered by this court upon an appeal involving solely a question of procedure.

> *Illinois Central R. Co.* v. *Adams*, 180 U. S. 28;
> *Old Colony Trust Co.* v. *Seattle*, 271 U. S. 426;
> *Male* v. *Atchison, etc., Ry. Co.*, 240 U. S. 97.

Illinois Central R. Co. v. *Adams*, supra, was an appeal to this court from the Circuit Court of the United States for the Southern District of Mississippi to review a decision dismissing a bill for injunction against the collection of state taxes on a railroad. Plaintiff

filed its bill against the defendant Adams as Revenue Agent of Mississippi, the Railroad Commission of the State, and the Canton, Aberdeen & Nashville Railroad to enjoin the Railroad Commission from certifying an assessment of taxes against the Canton Railroad for any of the years from 1886 to 1897 and to enjoin the Revenue Agent from taking any steps to collect the taxes. A temporary injunction issued upon filing the bill, but was subsequently dissolved and an appeal taken by the plaintiff to the Circuit Court of Appeals. This appeal was dismissed for want of jurisdiction, and a final decree subsequently entered in the Circuit Court dismissing the bill. The Circuit Court certified certain jurisdictional questions to this court.

Adams filed in this court a motion to dismiss the certified questions on the ground that before the bill was dismissed in the trial court, he had brought a suit in equity in the chancery court of Clay County, Mississippi, against the plaintiff, Illinois Central Railroad, and the Canton Railroad to collect the same taxes involved in the instant suit; that the defendants in their answer set up the same defenses relied upon in the instant case, which were overruled and final judgment given against the Railroad Companies making the taxes a paramount lien against their property; and that an appeal was then pending in the State Supreme Court.

This court stated the position of Adams in support of his motion to dismiss as follows:

"The argument is that, inasmuch as the injunction in this suit was vacated by the circuit court, the assessment of taxes completed, and suit brought upon it and judgment recovered, the appeal in this case is abortive and improper for the reason that the very things the bill was filed to prevent are accomplished facts, and the railway companies cannot be injured, inasmuch as they have a complete remedy by writ of error to the supreme court of the state from this court, if any Federal question be involved and decided against them by that court."

Answering this contention, the court said:

"We are of opinion that this is a defense to the *merits* of the case, and is no ground for the dismissal of the appeal. It would hardly be contended that, if this decree of the state court had been pronounced before the bill was filed in the Federal Court, the appeal would be dismissed upon motion upon that ground; much less that it could be set up as ground for dismissing an appeal to this court. The case is not different, if the decree, instead of being rendered before the bill is filed in the Federal court, is rendered after such a bill is filed, and pending suit. In either case it is a question whether it operates as an estoppel. While the fact that an appeal has been taken from such decree, which is still pending, introduces a new element, it is still the same question whether the decree can be made available as an estoppel upon motion to dismiss. (Italics ours).

> "It is true that since the injunction against him was dissolved, Adams has sued and has succeeded, but it does not follow that his judgment may *not be reversed* by the supreme court when plaintiff's right to prosecute this bill would be revived."

The basis of this court's decision is that the defense based upon action taken in the state court, alleged to render successful prosecution of its appeal by the plaintiff impossible, goes to the merits and cannot be raised in support of a motion to dismiss an appeal involving solely a question of jurisdiction.

In both the Illinois Central case and the case at bar, decrees were entered by a state court involving the matter in controversy in the federal court, pending an appeal to this court from a lower federal court. In both, the action of the state court is invoked in support of a motion to dismiss. In the Illinois Central case an appeal from the decree of the state court was pending at the time of the hearing of the motion to dismiss in this court. In the instant case there is still time to appeal from the final order of the Circuit Court of Kanawha County confirming the sale to the Glass Companies. As admitted by them, under the statute of West Virginia eight months is allowed from the entry of any decree for an appeal therefrom (Code of W. Va., Ch. 58, Art. 5, Sec. 4).

Old Colony Trust Co. v. *Seattle*, supra, was an ap-

peal by the plaintiff from a decree of the District Court for the Western District of Washington, dismissing its bill filed there to enjoin enforcement of a collusive agreement to shift a tax on city property to property of the complainant. The bottom question was the validity of the taxes involved. The District Court dismissed the bill on the ground that it constituted a suit against the state, and allowed a direct appeal to this court certifying the question of jurisdiction. The defendants filed a motion to dismiss, stating two grounds, the first, that the taxes had been paid about three weeks prior to the decree of dismissal by plaintiff's mortgagor and that this put an end to the effort of the state to collect them, and second, that since the appeal was taken, a decree had been rendered in another suit between the mortgagor and the defendants which determined the question relating to these taxes in favor of the defendants. This court overruled the motion to dismiss on the ground that both questions went to the merits and could not be considered upon a motion to dismiss where the only question before the court was jurisdictional.

Male v. *Atchison, etc., Ry. Co.*, supra, was a direct appeal from the District Court of the United States for the Southern District of New York to review a decree which dismissed for want of jurisdiction plaintiff's bill in a suit to enforce the liability of a Kansas corporation upon the bonds of a railroad company incorporated under an Act of Congress. A motion to dismiss was made on the ground that the questions involved

were moot for the reason that subsequent to the dismissal of the bill in the lower court, the appellant had instituted suit in the Supreme Court of New York upon the same cause of action against the same defendants, and that therein a final judgment upon the merits had been rendered dismissing the cause. This court stated that the question before it was one of jurisdiction and said:

> "But as our power to review is limited to the question of jurisdiction alone, and as the ground of the motion obviously involves the defense of 'the things adjudged,' going to the merits, the motion to dismiss is overruled, and we come to consider the question of the jurisdiction of the court below; that is, whether, as a Federal court, it had power to entertain the cause."

CONCLUSION

It is therefore respectfully submitted that the motion of the Respondents, Owens-Illinois Glass Company, a corporation, and Libbey-Owens-Ford Glass Company, a corporation, to dismiss the writ of certiorari heretofore granted herein on October 12, 1936, be denied.

FRED O. BLUE,
ROBERT S. SPILMAN,
Attorneys for Wayne United Gas Company, Petitioner.

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CHARLES ELMORE C
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 305

WAYNE UNITED GAS COMPANY, a corporation,

Petitioner,

vs.) IN BANKRUPTCY.

OWENS-ILLINOIS GLASS COMPANY, LIBBEY-OWENS-FORD GLASS COMPANY, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a corporation, and PAUL C. BEARDSLEE, TRUSTEES,

Respondents.

BRIEF OF OWENS-ILLINOIS GLASS COMPANY AND LIBBEY-OWENS-FORD GLASS COMPANY, RESPONDENTS, OPPOSING PETITION FOR WRIT OF CERTIORARI.

H. D. RUMMEL,
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Attorneys for Respondents.

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CONTENTS

Page

I. THE FACTS 1

II. THE ISSUE 3

III. ARGUMENT 4

(1) Petitioner's statement of the general rule of law and equity practice that a petition for rehearing may be filed and granted at any time within the term, even though the period for appeal has expired, is correct, but does not apply to the facts and issues in this proceeding 4

(2) The Circuit Court of Appeals correctly held that the period for rehearing was limited to the statutory period for taking an appeal 6

(3) If, as petitioner asserts, the decision of the Circuit Court of Appeals was controlled by the conclusion that the rehearing was granted solely to revive the right of appeal, certiorari should be denied ... 13

(4) The District Court had no jurisdiction to set aside and rehear the order of March 2nd after the end of the term at which it was entered 17

IV. CONCLUSION 19

TABLE OF CASES

Page

Bailey v. *Glover*, 21 Wall. (U. S.) 346 7

Bonner v. *Potterf*, (C. C. A. 10th, 1931) 47 F. (2d.) 852 ..... 8, 9

Cameron v. *National Surety Co.* (C. C. A. 8th, 1921) 272 Fed. 874 11

Conboy v. *First Nat'l Bank*, 203 U. S. 141 9

In re: Ives (C. C. A. 6th, 1902) 113 Fed. 911 12

In re: Glory Bottling Co. (C. C. A. 2d, 1922) 283 Fed. 110 18

In re: Rochester Sanitarium & Baths Co. (C. C. A. 2d, 1915) 222 Fed. 22 ..... 4, 12

In re: Stearns & White Co. (C. C. A. 7th, 1924) 295 Fed. 833 10

In re: L. H. Seifer & Sons Inc. (C. C. A. 7th, 1935) 78 F. (2d.) 196 13

McIntosh v. *United States* (C. C. A. 4th, 1934) 70 F. (2d.) 507 7

Sandusky v. *National Bank*, 23 Wall. (U. S.) 289. 18

Todd v. *Alden* (C. C. A. 8th, 1917) 245 Fed. 462.. 5

United States v. *East* (C. C. A. 8th, 1935) 80 F. (2d.) 134 8

West v. *McLaughlin & Co.* (C. C. A. 6th, 1908) 162 Fed. 124 12

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Respondents.

BRIEF OF OWENS-ILLINOIS GLASS COMPANY AND LIBBEY-OWENS-FORD GLASS COMPANY, RESPONDENTS, OPPOSING PETITION FOR WRIT OF CERTIORARI.

I.

THE FACTS

On March 2, 1936, the District Court disapproved and dismissed petitioner's original and first amended

and supplemental petitions for reorganization, and ordered that the cause "be retired from the docket" with costs to the objecting creditors (respondents here). Petitioner applied to the Circuit Court of Appeals for a review of that order, under section 24(b) of the Bankruptcy statute. On April 15, 1936, the Circuit Court of Appeals denied the petition on the ground that said order was reviewable only by appeal under section 25(a) of the Act. The appeal period of thirty days provided for in section 25(a) had expired on April 1st. On April 16th petitioner executed and promptly served notice of its intention to file in the District Court its petition for a rehearing of the order of March 2nd. A petition for rehearing was filed on April 24th, pursuant to said notice. Notwithstanding that no grounds were assigned for the rehearing not theretofore considered, the Court vacated the order of March 2nd and allowed a rehearing. On May 28th the District Court again dismissed the petitions for reorganization, and again retired the cause with costs to the respondents.

The term (November, 1935) at which the order of March 2nd was entered, terminated on April 20, 1936. (R. 19).

Respondents contended, and contend now, that after the expiration of the appeal period and the close of the term, the District Court was without jurisdiction to set aside the order of March 2, 1936, or to grant a

rehearing; consequently, that the appeal allowed by the District Court on June 11, 1936, while in form an appeal from the order of May 28, 1936, was in legal effect an appeal from the order of March 2, 1936. The Circuit Court of Appeals sustained this contention and dismissed the appeal.

II.

THE ISSUE

The order of May 12, 1936, vacating the order of March 2, and granting a rehearing thereof, and the order of May 28, 1936, again disapproving and dismissing the petitions for reorganization, were entered subsequent to the end of the term and after the expiration of the appeal period. Was it beyond the power of the District Court to enter them? That is the only issue.

No case cited by petitioner involves facts analogous to those in this record.

III.

ARGUMENT

(1)

Petitioner's statement of the general rule of law and equity practice that a petition for rehearing may be filed and granted at any time within the term even though the period for appeal has expired, is correct, but does not apply to the facts and the issues in this proceeding.

Respondents are in complete accord with the general principle stated and argued at page 10 of petitioner's brief that a petition for the rehearing of judgments at law and decrees in equity may be allowed at any time within the term even though the appeal period has expired. *The principle has no application to this proceeding.*

In law cases the source of this authority is the common-law power of the courts to control all orders entered at the term.[1]

In suits of equity, the authority is expressly given (in all cases where an appeal lies) by Equity Rule 69.

If a rehearing is granted within the term, the period for appeal begins to run from the final action of the

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[1] *In re Rochester Sanitarium & Baths Co.* (C. C. A. 2d, 1915) 222 Fed. 22.

court, and not from the original order. This is the rule laid down in the cases cited by petitioner at pages 10-12 of its brief, with which the respondents have not taken issue in this case.

The case of *Todd* v. *Alden* (C. C. A. 8th, 1917) 245 Fed. 462, cited by petitioner at page 13 of its brief does not support its contention. For all that appears, the petition for rehearing was filed promptly after the entry of the order dismissing the claim, and the Circuit Court of Appeals held that the appeal period ran from the entry of the final, not the original, order.

(2)

The Circuit Court of Appeals correctly held that the period for rehearing was limited to the statutory period for taking an appeal.

Predicating its position upon the general rule of law and equity practice that a rehearing may be granted at any time either before or *after the appeal period* if *within the term*, petitioner's argument is essentially as follows:

Premise: A rehearing may be granted at any time before or *after the appeal period if within the term.*

Proposition: In bankruptcy, there are no terms. (Thus eliminating the second condition of the premise.)

Conclusion: There is no definite limitation upon the time within which a rehearing may be granted in bankruptcy proceedings.[2]

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[2] Petitioner now asserts that the application must be "seasonably" made, and before the rights of others shall have become vested. As used by petitioner, the word "seasonably" has no meaning whatever. Moreover, a bankruptcy court would not hesitate to approve the filing of a petition for reorganization on the ground that the subsequent disposition thereof might involve the consideration of vested rights.

The Circuit Court of Appeals rejected this contention holding that the statutory provision limiting the appeal to thirty days placed a like limitation on the period within which a rehearing could be granted. In so doing, the Court did not lay down a rule for actions at law or suits in equity. It had declared the principle applicable to such proceedings in earlier cases, notably *McIntosh* v. *United States* (C. C. A. 4th, 1934) 70 F. (2d.) 507, *cert. denied*, 293 U. S. 586. It was dealing with a bankruptcy proceeding and its statement of the law was limited to the facts before it.

It has been many times emphasized by this Court that a speedy determination of the cause is of the very essence of a proper administration of the bankruptcy law. "The act is filled with provisions for quick and summary disposal of questions,"[3] clearly indicating that its spirit and purpose is to accelerate, and not to impede, the disposition of proceedings thereunder. Bankruptcy is a statutory creation and bankruptcy proceedings are governed entirely by the statute. It makes no general provision for rehearings. It makes ample provision that proceedings thereunder shall be disposed of with celerity.

Underlying the rule of law and equity practice that rehearings may be allowed within the term is the principle that until the close of the term, a judgment or decree remains within the breast of the court and

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[3] *Bailey* v. *Glover*, 21 Wall. (U. S.) 346.

subject to its control. The problem before the Circuit Court of Appeals in this case was to determine when a judgment or decree ceases to be within the control of the District Court in proceedings where, according to the general rule and *accepting petitioner's contention*, there are no terms. The Court found the answer in the appeal provisions of the statute. After thirty days an order reviewable under section 25 (a) and not appealed can not be reviewed. For the purpose of appeal, it is a finality. The Circuit Court of Appeals held that this statutory finality was intended to be decisive of the rights of the parties, and that it was not intended to be circumvented weeks, months, or years later by a rehearing for which the Act makes no provision.

Being of this opinion, the Circuit Court of Appeals below disposed of the case as follows:

> "We are of opinion that the Court below was without power to grant a rehearing and set aside the order of March 2nd after the expiration of the period allowed for appeal from that order."

In this view the Court was fully supported by the three decisions cited in the *per curiam* opinion. Petitioner asserts that in two of these cases[4] the rehearing

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[4] *Bonner* v. *Patterf*, (C. C. A. 10th, 1931) 47 F. (2d) 852;
United States v. *East* (C. C. A. 8th, 1935) 80 F. (2d) 134.

At page 18 of its brief petitioner takes the position that the decision of the Circuit Court of Appeals in this case rests upon a finding that the actual purpose of the rehearing was to revive the right of appeal. If petitioner's interpretation of the opinion be correct, the correctness of the decision will not be reviewed by a writ of certiorari. See *Post*, point (3) of Argument.

was resorted to for the purpose of restoring the expired right of appeal, but however that may be, the appellate courts in each instance definitely recognized the *lack of power* in the District Court to rehear orders appealable under section 25(a) after the expiration of the appeal period.

> "If it be considered in the nature of a petition for rehearing, it would seem that, because of having been filed after the expiration of the thirty days allowed for appeal, it came too late." *Bonner* v. *Potterf, supra.*

> "* * * the right of the United States to appeal from the order was lost to the government by its failure to take an appeal within the thirty days fixed by the statute. The proceedings by which it was attempted to extend time of appeal were ineffectual to that end. *Conboy* v. *First Nat. Bank of Jersey City*, 203 U. S. 141, 27 S. Ct. 50, 51 L. ed. 128;" (and other cases.) *United States* v. *East, supra.*

The opinion of *Circuit Judge Page*, speaking for the Circuit Court of Appeals for the 7th Circuit, is the most adequate discussion of the subject in the reports. After referring to the emphasis which this Court has laid upon expedition in bankruptcy cases, the opinion reads:

> "The early and final determination of the three appealable matters specified in Section 25-a is of vital importance, if the administration of estates in bankruptcy is to be accomplished within any reasonable time.

> "We are of opinion that the judgments that may be appealed from under the provision of section 25-a are final judgments; that after the time for appeal has expired, unless a petition for reconsideration has been filed within 10 days,[5] they may not be disturbed except under the provisions of section 57-k."[6]
>
> *In re Stearns & White Co.* (C. C. A. 7th, 1924) 295 Fed. 833.

Examination of these authorities discloses that the courts have been influenced in their views by the statements of this Court in the case of *Conboy* v. *First National Bank of Jersey City*, 203 U. S. 141.

Counsel for petitioner attempt to minimize the significance of the Conboy decision. They emphasize that the rehearing in that case was applied for and *denied*, and that the Court specifically reserved for decision the question whether a rehearing could have been *granted* after the appeal period and the effect, if it had been. While the decision of the particular point was reserved, the important considerations which

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[5] As drafted in Act of July 1, 1898, Ch. 541, 30 Stat. 553, section 25 (a) required that the appeal be taken within ten days. By the Act of May 27, 1926, Ch. 406, Sec. 10, 44 Stat. 665, the period was extended from ten to thirty days.

[6] Section 57 (k) (U. S. C. Title 11, Sec. 93) provides: "Claims which have been allowed in whole or in part may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed."

According to petitioner's contention, this legislative enactment is mere surplusage.

would be weighed in arriving at such a decision were clearly stated; namely, "the terms and spirit of the Bankruptcy Act."[7] Respondents respectfully assert that the terms and spirit of the Bankruptcy statute find full reflection in the decision of the Circuit Court of Appeals in this proceeding.

The decisions relied upon by petitioner are not persuasive. In *Cameron* v. *National Surety Co.* (C. C. A. 8th, 1921) 272 Fed. 874, the Circuit Court of Appeals pointed out specifically that the order appealed from did not refer in any way to the original order of adjudication, but was "an independent order made upon the pleadings and proofs." So considered, it did not present for determination the correctness of the original order of adjudication in bankruptcy or the subsequent order vacating the same. The validity of prior orders was not in issue. Not so here. The order of May 28, 1936, was expressly a disposition of the issues arising in the proceedings upon rehearing.[8] Its validity, upon motion to dismiss, depends entirely upon

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[7] "The petition was denied. Whether it could have been granted in view of the terms and spirit of the Bankruptcy Act, or the effect if it had been, we are not called upon to discuss."

Conboy v. *Jersey City Fidst Nat'l. Bank, Supra.*

[8] "* * * and thereupon this cause came on for further hearing and for a rehearing of all matters arising in this proceeding, pursuant to the petition and motion of the Debtor file herein on April 24, 1936, and to the order entered herein on April 24, 1936, and to the order entered herein on the 12th day of May, 1936, granting the rehearing and review prayed for as aforesaid and setting said cause down for hearing at this time." (Order of May 28, 1936, R. 20.)

the validity of the order vacating the order of March 2, 1936, and granting a rehearing thereof.

The decision in *In re Rochester Sanitarium & Baths Co.* (C. C. A. 2d, 1915) 222 Fed. 22, has no bearing here. There the estate had been closed and the trustee discharged, and the case was reopened and a new trustee appointed under the authority of the express language of section 2 of the Bankruptcy Act providing for the reopening of an estate where it is made to appear that it has been closed without being fully administered.[9]

In *West* v. *McLaughlin & Co., Trustees* (C. C. A. 6th, 1908) 162 Fed. 124, the court approved the reconsideration after the appeal period of an order rejecting a claim in excess of $500.00. The decision apparently rests upon a misconception of the holding of the same court in the earlier case of *In re Ives* (C. C. A. 6th, 1902) 113 Fed. 911, also cited by petitioner. In the latter case, a creditor filed a petition to vacate the adjudication of a voluntary bankrupt. Said petition was filed more than ten days after the order of adjudication. The court held that the creditor had no

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[9] "But the principle we are discussing is not applicable in such cases, as the matter is governed by the express provisions of the Bankruptcy Act. That Act confers jurisdiction upon the District Courts as courts of bankruptcy, and provides in section 2, subdivision 8, that they shall have the power 'to close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered'." (222 Fed. at page 26.)

right to oppose the adjudication by appeal, motion to vacate, or in any other manner. Consequently, the right to grant a rehearing after the appeal period was not an issue. The general language in the opinion that "the proceedings in a pending suit" are at all times open for reexamination is correct in so far as it goes, but was not relevant to that decision and does not reach the question involved in this case.

The cases cited by petitioner do not cast serious doubt upon the correctness of the clearly defined decision of the Circuit Court of Appeals in this proceeding.

(3)

If, as petitioner asserts, the decision of the Circuit Court of Appeals was controlled by the conclusion that the rehearing was granted solely to revive the right of appeal, certiorari should be denied.

It is an abuse of power for a Court at any time to grant a rehearing merely for the purpose of making possible an appeal, and all proceedings pursuant to such a rehearing are void. This is true whether the rehearing be granted before the expiration of the appeal period for the purpose of extending the same[10] or after the appeal period for the purpose of reviving it.

[10] *In Re L. H. Seifer & Sons, Inc.* (C. C. A. 7th, 1935) 78 F. (2d) 196, cert. denied, 296 U. S. 618.

Petitioner (page 19) says that apparently it was the conclusion of the Circuit Court of Appeals that such was the purpose of the rehearing here.

If petitioner's interpretation of the *per curiam* opinion be correct, there clearly is no ground for a review by this Court. Certainly there is no ground for a writ of certiorari which ordinarily may not be invoked to review findings of fact.

The record amply sustains the view that the rehearing was sought and allowed for the express purpose of permitting the petitioner to save itself from the position in which it had been placed by attempting to secure a review under section 24(b) instead of taking an appeal within thirty days under section 25(a).

This conclusion is borne out by numerous circumstances, certain of which may be summarized as follows:

(1) Petitioner did not seek a reconsideration of the order of March 2nd within the appeal period of thirty days. It took no step toward applying for a rehearing until April 16th, the day following the dismissal of the petition for review under section 24(b). (R. 4.)

(2) Every relevant allegation in the petition for rehearing and accompanying assignments of

error (R. 6-17) was raised directly in the original and first amended petition for reorganization and disposed of in the order of March 2nd.

(3) The only new matter appearing in the petition for rehearing was the reference to the unsuccessful attempt to secure a review of the order of March 2nd under section 24(b) of the Bankruptcy Act. The petition stated that the reference to said attempted review "may not be relevant," but was included so that "the Court may be fully advised." The only apparent purpose of so advising the Court was to procure, if possible, a restoration of the right of appeal under section 25(a).

(4) While the order granting the rehearing recites that it was for good cause shown, the petition and assignments of error are devoid of any new ground or cause for further consideration of the petitions for reorganization other than the irrelevant statements concerning the unsuccessful petition for review under section 24(b). The minor amendments to the proposed plan of reorganization *subsequently* included in the second amended petition for reorganization *were not set out in the petition for rehearing* and therefore could not have been the basis for granting the rehearing.

Moreover, these amendments were unrelated to the basic finding of the District Court that the plan of reorganization was not feasible, in disregard of the fundamental rights of the holders of the first mortgage bonds, and that the petitions were not filed in good faith.

(5) The ten separate findings made by the Court in the order of May 28th were a mere elaboration of the conclusions stated in the order of March 2, 1936. To illustrate, in the order of March 2nd, the Court made the general finding that the petitions did not adequately or fairly provide for the protection of the rights of the holders of the first mortgage bonds. In the order of May 28, 1936, the Court was more specific, stating that the properties of the petitioner were of inadequate value to pay off $1,900,000 of first mortgage obligations outstanding, and that despite this inadequacy the petitions for reorganization proposed to keep in effect provisions of the mortgage indenture by which a portion of the corpus of the mortgaged property would be applied to the payment of obligations other than first mortgage bonds.

(6) Petitioner's assertions in the brief that the District Court gave "mature" consideration to the matter "for three weeks" is pure con-

jecture. All that the record shows is that the petition for rehearing was filed during the first week of the April term, and three weeks later, after argument, the rehearing was granted.

If, as petitioner suggests, the Circuit Court's dismissal of the appeal was controlled by the conclusion that the rehearing was for the purpose of restoring the right of appeal, it cannot be said that such conclusion is not well supported in the record. The statement that the Court must have "attached controlling weight" to the single fact that the ultimate result was the same as at the first hearing is not sustained by the facts.

(4)

The District Court had no jurisdiction to set aside and rehear the order of March 2nd after the end of the term at which it was entered.

The order of March 2, 1936, disapproved and dismissed the petitions for reorganization and retired the cause from the docket. The term ended on April 20, 1936. Petitioner has cited no authority, and respondents believe that none can be cited, to support the view that the control of said order of dismissal remained in the Court after the close of the November, 1935, term. Petitioner's entire case on this point rests

on the generalization that "there are no terms in bankruptcy." This generalization is based upon an erroneous enlargement of the rule laid down by this Court that in a "pending suit" and "during the progress of the cause" a bankruptcy court is always open and has no separate terms."

The guiding principle is that in bankruptcy proceedings the Court is always open from the beginning to the close of the case, regardless of terms. It by no means follows, however, that after a case has been disposed of and retired, the same principle applies. If petitioner's view were accepted, parties could place no faith upon the dismissal of proceedings and there would be no finality to such orders. The petition for reorganization having been dismissed, the assets and properties of the petitioner remained in its control and custody, subject to the claims of creditors. Thereafter, the bankruptcy court had nothing to do with such properties. It cannot reasonably be contended that control of the order of dismissal remained with the Court after the term.

This view is supported by the opinion in *In re Glory Bottling Co. of New York, Inc.* (C. C. A. 2d, 1922) 283 Fed. 110, where an involuntary petition having been dismissed with costs, the petitioning creditors some months later made a motion to vacate and for a re-

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11 *Sandusky* v. *National Bank*, 23 Wall. 289, 293.

hearing. The order of the District Court granting the rehearing was reversed by the Circuit Court of Appeals. The latter Court pointed out that after the dismissal of the petition, the debtor was in the same position as any other person or corporation doing business unembarrassed by the bankruptcy court. There was no case pending before the court, and no proceeding was in progress. In respondents' view, none of the authorities sustaining the doctrine that the court is always open in a pending bankruptcy proceeding have any pertinency to this case.

CONCLUSION

Petitioner devotes the greater part of its brief to the proposition that the Court's *power* to grant a rehearing did not expire with the appeal period. On that proposition petitioner is not supported by the spirit of the Bankruptcy Act or by the decisions.

If, as petitioner asserts, the decision rests upon the finding that the true purpose of the rehearing was to restore the right of appeal, the case clearly is not one which calls for the issuance of a writ of certiorari.

To what extent the Circuit Court of Appeals gave weight to the point that the cause had been retired from the docket at the preceding term, the opinion does not clearly show. In respondents' view, that proposition alone would foreclose any relief to the petitioner on this record.

The granting of the writ would further delay the respondents in the enforcement of their undoubted rights as holders of first mortgage bonds. At the same time, no ultimate relief can be afforded the petitioner on the record.

No important question of general law is involved and on this record, petitioner cannot be interested in the settlement of any such question. The findings of the District Court warrant the conclusion that the only interest of the petitioner is to delay the respondents in the enforcement of their legal rights.[12]

For the reasons herein stated respondents assert that the petition for a writ of certiorari should be denied.

Respectfully submitted,

H. D. RUMMEL,
D. O. BLAGG,
A. G. STONE,
Attorneys for Respondents.

Charleston, W. Va.
September 10, 1936.

---

[12] Default in payment of interest and sinking fund occurred in June, 1932. For a history of the litigation by which the bondholders have been delayed in the enforcement of their claims, see: *Bell* v. *Wayne United Gas Co.* (W. Va. 1935) 181 S. E. 609.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 305

WAYNE UNITED GAS COMPANY, a corporation,

Petitioner,

v.

OWENS-ILLINOIS GLASS COMPANY, LIBBEY-OWENS-FORD GLASS COMPANY, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a corporation, and PAUL C. BEARDSLEE, TRUSTEES,

Respondents.

BRIEF FOR OWENS-ILLINOIS GLASS COMPANY AND LIBBEY-OWENS-FORD GLASS COMPANY, RESPONDENTS.

H. D. RUMMEL,
D. O. BLAGG,
A. G. STONE,

Counsel for said Respondents.

ROSE CITY PRESS, LAW PRINTERS, CHARLESTON, W. VA.

SUBJECT INDEX

	Page
The Case and Opinion Below	1
Question Presented	2
Statement	3
Summary of Argument	4
Argument	5
The District Court had no jurisdiction to vacate the order of March 2d, and to grant a rehearing, upon a petition filed after the expiration of the period for appeal therefrom	5
The District Court had no jurisdiction to entertain a petition to vacate the order of March 2, 1936, filed at a subsequent term of court	23
Conclusion	27

TABLE OF CASES

Page

A

American S. S. Nav. Co., (D. C. E. D. Pa., 1933) 14 F. Supp. 106 13-20

B

Bonner v. *Potterf*, (C. C. A. 10th, 1931) 47 F. (2d) 852 12-22

Brady et al v. *Bernard & Kittinger, et al.*, (C. C. A. 6th, 1909) 170 Fed. 576 17-18

Burr Mfg. & Supply Co., (C. C. A. 2nd, 1914) 217 Fed. 16 26

C

Cameron v. *National Surety Co.*, (C. C. A. 8th, 1921), 272 Fed. 874 19

Samuel W. Cooper, Trustee v. *Lincoln Rauch*, (Appendix "A") 21-22

Cooper, Trustee, v. *A. Lincoln Rauch* (C. C. A. 1936), 82 F. (2d) 1005 22

Chicago M. & St. P. Ry. Co. v. *Leverentz* (C. C. A. 8th), 19 F. (2d) 915 6

Clarke v. *Hot Springs E. L. & P. Co.*, (C. C. A. 10th), 76 F. (2d) 918 6

Conboy v. *First National Bank*, 203 U. S. 141, 27 S. Ct. 50, 51 L. ed. 128 7-12-19

Continental Ill. N. B. & T. Co. v. *C. R. I. & P. R. C.*, 294 U. S. 648, 675 23

Credit Company v. *Arkansas Central Railway Co.*, 128 U. S. 258, 261 8

F

Freed v. *Central Trust Co.*, (C. C. A. 7th) 215 Fed. 873 26

G

Glory Bottling Co. of New York, Inc., (C. C. A. 2d, 1933) 283 Fed. 110 25-26

Page

I

Ives (C. C. A. 6th, 1902), 113 Fed. 911 16

M

Memphis v. *Brown*, 94 U. S. 715 6

N

Northwestern P. S. Co. v. *Pfeifer* (C. C. A. 8th), 36 F. (2d) 5 6

O

Old Nick Williams Co. v. *United States*, 215 U. S. 541 8

R

Rochester Sanitarium & Baths Co., (C. C. A. 2d, 1915) 222 Fed. 22 19-26

S

Sandusky v. *National Bank*, 90 U. S. (23 Wall.) 289, 293 5-15-27

L. H. Seifer & Sons, Inc., (C. C. A. 7th, 1935) 78 F. (2d) 196, cert. denied 296 U. S. 618 13-14

Stearns & White Co., 295 Fed. 833 10-14-21-22

U

United States v. *Benz*, 282 U. S. 304 6

United States v. *East*, (C .C. A. 8th, 1935) 80 F. (2d) 134 12-13-19-22

United States v. *Mayer*, 235 U. S. 55 6

W

Wayne United Gas Co. v. *Owens-Illinois Glass Co. et al.*, 84 Fed. (2d) 965 22

West v. *McLaughlin's Trustee* (C. C. A. 6th, 1908), 162 Fed. 124 13-16

Wiswall v. *Campbell*, 93 U. S. 347, 350 9

Wright (D. C. Mass., 1899), 96 Fed. 820 13

Z

Zimmern v. *United States*, 298 U. S. 167 6

IN THE

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OCTOBER TERM, 1936

No. 305

WAYNE UNITED GAS COMPANY, a corporation,

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v.

OWENS-ILLINOIS GLASS COMPANY, LIBBEY-OWENS-FORD GLASS COMPANY, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a corporation, and PAUL C. BEARDSLEE, TRUSTEES,

Respondents.

BRIEF FOR OWENS-ILLINOIS GLASS COMPANY AND LIBBEY-OWENS-FORD GLASS COMPANY, RESPONDENTS.

THE CASE AND OPINION BELOW

On March 2, 1936, the District Court for the Southern District of West Virginia, disapproved and dismissed the original and supplemental petitions of the Wayne United Gas Company (petitioner) for reorganization under section 77B of the Bankruptcy Statute. Petitioner failed to take an appeal under

section 25(a) within the period of thirty days provided thereby. On April 24, 1936, at a succeeding term of the Court, petitioner filed a petition for rehearing. On May 12th, the District Court set aside its original order and granted the rehearing, but on May 28th, it again disapproved and dismissed the petitions for reorganization. Petitioner perfected an appeal to the Circuit Court of Appeals and a motion to dismiss was filed by respondents.

The Circuit Court of Appeals held that the effect of the order granting the rehearing, as well as of the order dismissing the several petitions for reorganization, was an attempt to extend the time for appealing the order of March 2nd beyond the statutory period of thirty days. It, therefore, dismissed the appeal "as though it had been taken from that order." (R. 60).

The court's opinion is found at page 59 of the Record, and reported in 84 F. (2d) 965.

QUESTION PRESENTED

The question presented is whether the District Court had jurisdiction to vacate and reconsider its order of March 2, 1936, upon petition filed after the period for appealing that order had expired, and after the term at which it was entered.[1]

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[1] The issue is similarly presented in brief of petitioner, pages 16-17. The statement of the "Question Presented" at page 2 of brief for petitioner omits reference to the fact that the rehearing was allowed at a subsequent term of court.

STATEMENT

The order of March 2, 1936, disapproved and dismissed the original and first amended petitions for reorganization filed by the debtor (petitioner), decreed costs to the respondents and ordered that the cause be retired from the docket. (R. 3).

April 15, 1936, the Circuit Court of Appeals denied an appeal under section 24(b) of the Bankruptcy Act, holding that the order of March 2d was appealable under section 25(a) of said Act.

April 16, 1936, debtor prepared and signed notice of intention to apply for rehearing in the District Court. (R. 4.)

April 21, 1936, a new term of the District Court began at Charleston. (R. 19.)

April 24, 1936, debtor filed its petition praying that the order of March 2d be set aside and vacated and for a rehearing and review of all matters arising in the proceedings. (R. 6-12.)

May 12, 1936, the District Court vacated and set aside the order of March 2d and granted and awarded "a rehearing or a review" of the matters arising in the proceeding. (R. 18.)

The only matter contained in the petition for rehearing not theretofore presented in the original and

amended petitions for reorganization was the reference to the unsuccessful attempt to secure a review of the order of March 2d under section 24(b) of the Bankruptcy Act. Upon this petition, the Court found that "good cause" existed for setting aside its previous order. (R. 18.)

May 28, 1936, the District Court entered a final order again disapproving and dismissing the petitions for reorganization as not filed "in good faith". It again decreed costs to the respondents and again retired the cause from the docket. The findings contained in the order were an elaboration of the conclusions reached in the order of March 2d. Among other things, the Court found that the assets of the petitioner were insufficient to pay off the first mortgage indebtedness of approximately $1,900,000; that said amount "is due and payable at this time", and that "the securities of the Debtor, other than the first mortgage bonds, represent no equity or value in the mortgaged property to support such securities." (R. 22.)

SUMMARY OF ARGUMENT

A summary of the points of argument is incorporated in the Subject Index, *ante*.

ARGUMENT

(1)

The District Court had no jurisdiction to vacate the order of March 2d, and to grant a rehearing, upon a petition filed after the expiration of the period for appeal therefrom.

The Circuit Court of Appeals adopted the view that the provisions of section 25(a) of the Bankruptcy Act which limit the appeal period to thirty days necessarily limit the time for rehearing to the same period.

Petitioner attempts to avoid this principle with the assertion that "a federal district court" has power to grant a rehearing of "a final judgment or decree" after the expiration of the appeal period, and that "in cases at law or in equity the only limitation upon this power" is that it must be exercised within the term. Upon the theory that there are no terms in bankruptcy,[2] petitioner proceeds to the conclusion that there is no limitation upon a rehearing in a bankruptcy proceeding other than that the application be made "seasonably" and before rights have become vested.

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[2] "A proceeding in bankruptcy from the time of its commencement, by the filing of a petition to obtain the benefit of the Act, until the final settlement of the estate of the bankrupt, is but one suit. The District Court, for all purposes of its bankruptcy jurisdiction, is always open. It has no separate terms." *Sandusky v. National Bank*, 90 U. S. (23 Wall.) 289, 293.

Petitioner takes this view notwithstanding that the order of March 2, 1936, was a final one closing the case, retiring it from the docket, and that the term at which it was entered, as well as the appeal period, had expired when the appplication for rehearing was filed.

The rule of the district courts in law and equity cases, invoked by petitioner, has no application to this proceeding. The jurisdiction to grant a rehearing in equity is controlled by Equity Rule 69. That rule expressly limits the period for the allowance of a rehearing to the term at which the decree is entered. This limitation is analogous to the principle which prevents a court of law from granting a new trial upon motion made after the term at which the judgment is entered.[3] During the term, a decree or judgment is deemed to be within the breast of the court. Consistent with this principle, it is immaterial to the allowance of a rehearing in law and equity cases that the appeal period has expired, *provided that the term*[4] has not come to a close. Appellees do not challenge the many cases cited by petitioner which support this proposition.[5]

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[3] *United States* v. *Mayer*, 235 U. S. 55; *United States* v. *Benz*, 282 U. S. 304.

[4] All italics ours.

[5] *e. g., Zimmern* v. *United States*, 298 U. S. 167; *Memphis* v. *Brown*, 94 U.S. 715; *Northwestern P. S. Co.* v. *Pfeifer* (C.C.A. 8th) 36 F. (2d) 5; *Chicago, M. & St. P. Ry. Co.* v. *Leverentz* (C.C.A. 8th) 19 F. (2d) 915; *Clarke* v. *Hot Springs E. L. & P. Co.*, (C.C.A. 10th) 76 F. (2d) 918.

The principle which limits a rehearing in law and equity cases to the term can have no application to a pending bankruptcy proceeding in which the court is always open and in which there are no terms. Similarly, the numerous law and equity decisions cited by petitioner furnish no guide as to the period within which a rehearing may be allowed in a bankruptcy case. Petitioner insists that, there being no terms, the usual limitation upon the period for a rehearing is removed, and that orders in bankruptcy, although final and appealable, remain in the control of the court and may be reconsidered unless rights have become vested.

It is plainly the intent of the Bankruptcy Act that those who deem themselves prejudiced by final orders in a proceeding shall appeal the same within the period provided or be bound thereby. The Act contains numerous provisions for the speedy and summary disposition of questions presented thereunder. Consistent with these views, respondents contend, and the Circuit Court of Appeals held, that orders reviewable under section 25(a) but not appealed thereunder, are final and irrevocable. They are no longer within the discretionary control of the court to recall upon application for reconsideration.

In *Conboy* v. *First National Bank*, 203 U. S. 141, the appellant made application for a rehearing in the Court of Appeals after the expiration of the appeal period of thirty days at that time provided in Gen-

eral Order in Bankruptcy XXXVI. The rehearing was denied, and application was made to this Court for an appeal. In holding that the application came too late, the opinion of MR. JUSTICE FULLER states:

> "The right of appeal had then been lost and appellant could not reinvest himself with that right by filing a petition for rehearing."

The opinion notes the point that the petition for rehearing was *denied* and concludes with this statement:

> "Whether it could have been granted in view of the terms and spirit of the Bankruptcy Act, or the effect, if it had been, we are not called upon to discuss."

The Circuit Court of Appeals in this case and other Courts have given the effect to the "terms and spirit" of the statute which seems to have been intended by this Court.* The rule adopted by these courts is that, where no appeal is taken or rehearing sought within the thirty days, the jurisdiction of the District Court is exhausted, and that such court is without power either to reconsider its decree or to revive the right of appeal therefrom. It was clearly the intent of Congress that orders appealable under section 25(a) should become final unless relief therefrom is sought within the period prescribed, and the decision of the

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* Cf. *Old Nick Williams Co.* v. *United States*, 215 U.S. 541; *Credit Company* v. *Arkansas Central Railway Co.*, 128 U.S. 258, 261.

Circuit Court of Appeals in this case gives to the statute the only interpretation consistent with that intent.

This Court has never departed from its analysis of the purposes of the Bankruptcy Act as stated in the case of *Wiswall* v. *Campbell*, 93 U. S. 347, 350, where it said:

> "Congress in enacting the Bankruptcy Law, had apparently in view: (1) the discharge, under some circumstances, of an honest debtor from legal liability for debts he could not pay; and (2) an early pro rata distribution, according to equity, of his available assets among his several creditors. Prompt action is everywhere required by law. In *Bailey* v. *Glover*, 21 Wall. 346, we said, speaking through Mr. Justice Miller, that 'it is obviously one of the purposes of the bankrupt law that there should be a speedy distribution of the bankrupt's assets. This is only second in importance to securing equality of distribution. The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay.'"

It is the intention of Congress that a bankruptcy proceeding be carried to conclusion with the greatest speed consistent with justice. In equity cases generally, ninety days are allowed for taking an appeal. In bankruptcy cases, certain final orders must be appealed in one-third that time. Speedy finality for such orders is demanded. Yet petitioner contends that until

rights shall have become vested, a decree, however final, is continuously open for re-examination and revision upon a rehearing "seasonably" applied for.

The same question as is here presented was considered in the case of *In re Stearns & White Co.*, 295 Fed. 833, decided by the Circuit Court of Appeals for the Seventh Circuit in 1924. That court critically and exhaustively examined the contentions, similar to those made by petitioner here, and definitely concluded that the period for rehearing and the period for appeal were the same. In that case the District Court, by orders entered February 3d and 28th, 1923, affirmed the referee's allowance of a claim for $17,056.96. The order was appealable under section 25(a). At that time the appeal period was limited to ten days.[7] Appellant did not perfect an appeal within that period. Two months later, an order was entered vacating the orders of February 3d and 28th, but again affirming the referee's allowance. The decision of the Circuit Court of Appeals was upon the motion to dismiss the appeal taken from this last order. Reviewing the historical development of the Bankruptcy Act and the decisions of this Court, CIRCUIT JUDGE PAGE concluded that:

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[7] By section 8 of the Act as enacted in 1867, the appeal period from an order allowing or rejecting a claim was fixed at ten days. By the act of July 1, 1898, Ch. 541, section 25 (a) 30 Stat. 553, the same limitation of ten days was made applicable to orders of adjudication. By the Act of May 27, 1926, Ch. 406, sec. 10, 44 Stat. 665, the period of appeal from both classes of orders was extended from ten to thirty days.

> "The early and final determination of the three appealable matters specified in section 25a is of vital importance, if the administration of estate in bankruptcy is to be accomplished within any reasonable time.
>
> "We are of opinion that the judgments that may be appealed from under the provisions of section 25a are final judgments; that after the time for appeal has expired, unless a petition for reconsideration has been filed within ten days, they may not be disturbed, except under the provisions of section 57k."

JUDGE PAGE rejected the suggestion that Congress intended to leave the way open to rehearings for an indefinite length of time after the entry of the final order. Such an intention is the very antithesis of the "terms and spirit" of the Bankruptcy Act and of the "quick and summary" disposal of questions which this Court has said is one of the principal aims of the statute.

It was upon this conception of the spirit and purpose of the Bankruptcy Act that the Circuit Court of Appeals disposed of the present case as follows:

> "We are of opinion that the Court below was without power to grant a rehearing and set aside the order of March 2nd after the expiration of the period allowed for appeal from that order."

Petitioner urges that the decisions* cited in the *per curiam* opinion are not persuasive for the reason that it reasonably appeared in each of them that the rehearing was sought for the express purpose of restoring the right of appeal. The significant fact here is that in the cases cited the courts definitely recognized the *lack of power* in the District Court to reopen the proceeding after the appeal period of thirty days, and that they predicated this lack of power upon the terms and spirit of the Bankruptcy Act as indicated by this Court in the *Conboy* decision.

> "This petition is in the record designated as a petition to reopen or, if it be considered as a petition for rehearing, the effect of such petition and its status as a legal document is substantially the same. If it be considered in the nature of a petition for rehearing, it would seem that, because of having been filed after the expiration of the thirty days allowed for appeal, it came too late. *Conboy* v. *First National Bank*, 203 U. S. 141, 27 S. Ct. 50, 51 L. ed. 128."
>
> *Bonner* v. *Potterf, supra.*

> "From this record, it is clear that the trustee in bankruptcy obtained a final judgment of the District Court disallowing the claim of the United States against the bankrupt estate on October 12, 1932, and that the right of the United States to appeal from the order was lost

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* *Bonner* v. *Potterf*, (C.C.A. 10th, 1931) 47 F. (2d) 852; *United States* v. *East*, (C.C.A. 8th, 1935) 80 F. (2d.) 134.

> to the government by its failure to take an appeal within the thirty days fixed by statute. The proceedings by which it was attempted to extend time of appeal was ineffectual to that end. *Conboy* v. *First Nat. Bank of Jersey City*, 203 U. S. 141, 27 S. Ct. 50, 51 L. ed. 128."
>
> *United States* v. *East, supra.*

A singular confusion of thought has resulted in certain cases from a failure to recognize the elemental proposition that after the appeal period there is no *jurisdiction* to entertain a petition for reconsideration. For example, in *In re American S. S. Nav. Co.*, (D.C.E.D. Pa. 1933) 14 F. Supp. 106, and in *In re Wright* (D. C. Mass. 1899) 96 Fed. 820, it was held that it was within the jurisdiction of the district court to grant a rehearing asked for the express purpose of reviving the right of appeal.[9] Other cases, including *West* v. *McLaughlin's Trustee* (C.C.A. 6th, 1908) 162 Fed. 124, relied upon by petitioner, denies the existence of any such authority, and clearly the better rule is that it is an abuse of power for a court at any time to grant a rehearing merely for the purpose of making possible an appeal. This is true whether the application be granted before the expiration of the appeal period for the purpose of extending the same,[10] or

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[9] Other cases of like import cited in brief for petitioner, page 27, footnote 4.

[10] *In re L. H. Seifer & Sons, Inc.*, (C.C.A. 7th, 1935) 78 F. (2d) 196, cert. denied, 296 U. S. 618.

after the appeal period for the purpose of reviving it.

In the opinion in *In re Stearns & White Co., supra,* the court held that after the expiration of the appeal period orders appealable under section 25(a) "may not be disturbed, except under the provisions of section 57k."

Section 57k (U. S. C. Title 11, sec. 93, subd. k) is as follows:

> "Claims which have been allowed may be reconsidered for cause and re-allowed or rejected in whole or in part, according to the equities of the case, before but not after the closing of the case."

If petitioner's position in this case be correct, the foregoing section is mere surplus legislation. The only reasonable conclusion to be drawn from sections 25(a) and 57(k) is that orders appealable under the former become final and irrevocable at the expiration of thirty days, with the single exception that *an order allowing a claim* may be reconsidered for cause at any time prior to the closing of the estate.[11] Petitioner would enlarge upon this exception with the contention that any order appealable under section 25(a) may be reconsidered at any time before rights thereunder have become vested.

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[11] This point of view is consistent with the reasoning of the Circuit Court of Appeals for the Seventh Circuit in *In re L. H. Seifer & Sons, Inc., supra.* where it was stated that the provisions of section 57k are "exclusive".

Petitioner's argument (pages 17-21) carries repeated references to the Sandusky Case[12] and concludes with the statement that:

> "It is submitted that the action of the District Court in the case at bar is sustained by the doctrine of the Sandusky case and the line of federal decisions which has followed it.'"

The decision of this Court in the Sandusky case is but remotely relevant here. Sandusky was adjudicated a bankrupt. Months later he filed a petition in the District Court praying that the order of adjudication be set aside and vacated. The Court dismissed the petition. The Circuit Court affirmed the order of the District Court. Sandusky appealed to this Court, and, upon motion to dismiss, the question arose whether the petition filed in the District Court presented "a case in equity" under the Bankruptcy Act appealable here, or merely a part of the proceedings in bankruptcy of which this Court could not take jurisdiction on appeal. No question of time restriction on the period for rehearing or appeal was involved. No such question could have been presented for the reason that the Bankruptcy Act at that time fixed no period for an appeal from an order of adjudication. The point decided was that a petition for rehearing is part and parcel of "the proceedings in bankruptcy". There is no reason to believe that this Court, in explaining the continuous character of such

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[12] *Sandusky* v. *National Bank, supra.*

a proceeding, intended to express any opinion as to the effect of a statutory limitation upon the period in which appeals may be taken or rehearings considered.

With the possible exception of the opinion in *West* v. *McLaughlin & Co.'s Trustee, supra*, the expressions relied upon by petitioner in the cases cited by it are voluntary and collateral to the real issues involved.

In *West* v. *McLaughlin & Co.'s Trustee* the District Court on July 23, 1907, disallowed a claim for $5000.00. Upon a rehearing, applied for and granted more than ten days subsequent to said date, the District Court again disallowed the claim. The trustee in bankruptcy moved to dismiss the appeal taken from the subsequent order. The Circuit Court of Appeals overruled the motion to dismiss. The decision rests for justification upon certain expressions of the same court in the earlier case of *In re Ives* (C. C. A. 6th, 1902) 113 Fed. 911, also cited by petitioner. In the latter case, a creditor filed a petition to vacate the adjudication of a voluntary bankrupt. Said petition was filed more than ten days after the order of adjudication. The court held that the creditor had no right at any time to oppose the adjudication by appeal, motion to vacate, or in any other manner, and, therefore, dismissed the petition. The power of the District Court to vacate its prior order and to grant a rehearing after the appeal period was not properly

in issue. The general language in the opinion that "the proceedings in a *pending* suit" are at all times open for reexamination and that the court had power to determine the matters presented in the petition was not relevant to the decision.

It is significant to compare the language in these opinions with the subsequent decision of the same court in *Brady et al.* v. *Bernard & Kittinger, et al.*, (C. C. A. 6th, 1909) 170 Fed. 576. The facts were that on April 17, 1908, Philip Brady was adjudicated a bankrupt. More than ten days later, Brady and others moved the District Court to set aside the order of adjudication on the ground of alleged fraud on the part of those who had procured its entry. This motion was overruled and an appeal was taken. Motion to dismiss was filed on the ground that the appeal was not taken within ten days from the date of order of adjudication.

The opinion of DISTRICT JUDGE SANFORD, concurred in by JUDGES SEVERENS and KNAPPEN is in part as follows:

> "In so far as the appeal was taken from the judgment of adjudication entered April 17, 1908, the motion to dismiss must be granted. Section 25a of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), provides that an appeal taken from a court of bankruptcy to the Circuit Court of Appeals from a judgment adjudging a defendant

> a bankrupt 'shall be taken within ten days after the judgment appealed from has been rendered.' As no appeal was prayed or granted from the judgment of adjudication within 10 days after its rendition, the time for appealing therefrom expired at the end of the said 10 days, and could not be extended or revived by any subsequent proceeding in the case. Credit Company v. Arkansas Railway Company, 128 U. S. 258, 261, 9 Sup. Ct. 107, 32 L. Ed. 448; Conboy v. First Nat. Bank, 203 U. S. 141, 145, 27 Sup. Ct. 50, 51 L. Ed. 128; In re Alden Electric Company, 123 Fed. 415, 50 C. C. A. 509. As neither the motion nor the petitions to set aside said judgment were made or presented to the court until after the expiration of said 10 days, the case cannot, for that reason, if for no other, be brought, even by analogy, within the rule laid down by this court in the case of Mills v. Fisher & Co., 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. (N. S.) 656, that where a petition to rehear is filed within 10 days after the judgment the time for taking an appeal is thereby extended."

For the reason stated, and the additional reason that the Bankruptcy Act made no provision for the appeal of the order overruling the motion to set aside the adjudication, the appeal was dismissed. The statement above quoted, that the appeal period can not be "extended or revived by any subsequent proceeding in the cause" gives true effect to the statutory provision. When the attempted extension or revival is in the form of an application for rehearing after the appeal

period the inhibition of the statute is a bar which neither the court nor a litigant has power to ignore.

In *Cameron v. National Surety Co.* (C.C.A. 8th, 1921), 272 Fed. 874, the Circuit Court of Appeals for the Eighth Circuit pointed out specifically that the order appealed from did not refer in any way to the original order of adjudication, but was "an independent order made upon the pleadings and proofs." So considered, it did not present for determination the correctness of the original order of adjudication in bankruptcy or the subsequent order vacating the same. The validity of prior orders was not in issue. Not so here. The order of May 28, 1936, was expressly a disposition of the issues arising in the proceedings upon rehearing. Its validity, upon motion to dismiss, depends entirely upon the validity of the order vacating the order of March 2, 1936, and granting a rehearing thereof. The opinion in *United States* v. *East, supra,* decided in 1935, indicates that the Circuit Court of Appeals for the Eighth Circuit holds to the view that an application for rehearing filed after the appeal period is "ineffectual" to restore the right of appeal. It cites the *Conboy* case in support of this conclusion.

The decision in *In re Rochester Sanitarium & Baths Co.* (C.C.A. 2d, 1915) 222 Fed. 22, has no bearing here. There the estate had been closed and the trustee discharged. Two years later the order closing the

estate and discharging the trustee was vacated, upon a showing that the estate had not been fully administered. The Court held that the case was governed "by the express language" of section 2 of the Bankruptcy Act providing for the reopening of an estate where it is made to appear that it has been closed without being fully administered.[13]

Petitioner's statement that the decision in this case is contrary to "the rule recognized in the Third Circuit" rests upon *In re American S. S. Nav. Co. supra.*[14] The District Court granted a rehearing of an order allowing a claim for the express purpose of restoring the right of appeal. In that case District Judge Kirkpatrick had this to say:

> "In cases of this kind, two distinct questions arise which are often confused. First, has this court the power to grant a rehearing? That is all that is before me. Second, if so, will it be effective to revive the petitioner's lost right of appeal? With that I have nothing to do."
>
> * * *
>
> "I express no opinion as to whether the petitioner's appeal can legally be prosecuted, or whether his right is gone beyond recall. That question I conceive to be for the appellate court."

On motion to dismiss the appeal taken in that case, the Circuit Court of Appeals for the Third Circuit

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[13] U.S.C. Title 11, sec. 11, subd. 8.

[14] District Court—E. D. Pa. (1933) 14 F. Suppl. 106.

specifically approved the proposition that a District Court is without power to grant a rehearing of such an order after the appeal period of thirty days, stating its views as follows:

> "The appellee contends in support of his motion, that the District Court has no power to allow a petition for the rehearing of a claim for the simple purpose of extending the time allowed for an appeal of its order. Doubtless, that is a correct contention. Conboy v. First National Bank, 203 U. S. 141; Bonner v. Potterf, 47 Fed. (2d) 852 (C.C.A. 10). Such action would permit the defeat of the intention of section 25(a) of the Bankruptcy Act, as amended, which provided that appeals in bankruptcy from an order allowing or rejecting a claim must be taken within thirty days after the order has been rendered. 11 U.S.C.A. section 48."
>
> (*Samuel W. Cooper, Trustee*, v. *A. Lincoln Rauch*, decided October 24, 1934; unreported opinion copied in full "Appendix A").

Further in the opinion, the Court quoted with approval the language of CIRCUIT JUDGE PAGE in *In re Stearns and White Company, supra*, and stated that the appellant's right to a rehearing was limited to the relief provided in section 57(k). Entertaining these views the court said that "If this was an ordinary case, we would be constrained to dismiss the appeal". A peculiar circumstance in that case, however, was the fact that the same attorney had acted in the dual

capacity of trustee in bankruptcy and counsel for the beneficiary of the allowance in the District Court. By conduct "highly suggestive of bad faith and fraud" he had failed to perfect the appeal within the statutory period. It was for this reason that the motion to dismiss the appeal was "at this time" denied.

Upon the hearing on the appeal, the Circuit Court of Appeals, in a *per curiam* opinion of six lines, affirmed the order of the District Court without reference to the procedural question.[15] The case was an extraordinary one on its facts, and the appellate court deemed it expedient to affirm the case on its merits.

The principle that the jurisdiction of the District Court to entertain a rehearing of orders appealable under section 25(a) expires with the appeal period is definitely recognized and established by the highest courts in the Third, Fourth, Seventh, Eighth, and Tenth Circuits.[16] Any expressions to the contrary in the opinions from the Sixth Circuit can hardly be considered persuasive authority elsewhere.

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15 *Per Curiam;* "After argument and full consideration in this case, we are of opinion the judge below, as set forth in his opinion, was justified in dismissing the exceptions filed to the claim of the appellee and in his allowing such claims. The judgment below is therefore affirmed."

Cooper, Trustee, v. *A. Lincoln Rauch* (C.C.A. 1936) 82 F. (2d.) 1005.

16 See respectively: *Samuel Cooper, Trustee,* v. *Rauch* "Appendix A"; *Wayne United Gas Co.* v. *Owens-Illinois Glass Co. et al.; In re: Stearns & White Co. supra; United States* v. *East, supra; Bonner* v. *Potterf, supra.*

(2)

The District Court had no jurisdiction to entertain a petition to vacate the order of March 2, 1936, filed at a subsequent term of court.

The Sandusky opinion states that from the "filing of the petition" to the "final settlement of the estate" a bankruptcy proceeding is "but one suit." The Bankruptcy Court "is always open." It has no separate terms. Its proceedings in "any pending suit" are at all times open for re-examination and may be set aside.

The reason for the rule as thus stated is that the Bankruptcy Act authorizes courts of bankruptcy to exercise their jurisdiction "in vacation, in chambers, and during their respective terms."[17] It does not follow from this, however, that bankruptcy courts are exempt from the basic rules of procedure, not in conflict with the statute. "They are essentially courts of equity, and their proceedings inherently proceedings in equity . . . Their adjudications and orders constitute in all essential particulars decrees in equity."[18]

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[17] U. S. C. Title 11, Sec. 11.

[18] *Continental Ill. N. B. & T. Co.* v. *C. R. I. & P. R. C.*, 294 U. S. 648, 675.

By virtue of the statute a pending bankruptcy case is considered one continuous proceeding from the filing of the petition until the closing of the estate, but there is nothing to warrant the view that the proceeding continues after the petition has been dismissed and the cause retired from the docket. When that occurs the jurisdiction of the court can certainly be no wider than in an ordinary suit in equity where a final order dismissing the bill and retiring the case has been entered.[10]

Upon the entry of an order of adjudication, or, of an order approving a petition for reorganization under section 77-B, there comes into being a "pending" case and during its "progress" the court is always open regardless of terms. When, however, adjudication is denied, or a petition for reorganization is disapproved and the cause dismissed, nothing is pending and no case is in progress.

In such event the assets of the debtor are not in *custodia legis*, but in its own custody, subject to the claims of creditors and the decrees and judgments of state courts.

There is no statute and no analogy to equity or common law practice from which it can be asserted that such an order does not become final and irrevocable at the close of the term at which it is entered.

---

[10] Except perhaps under the provisions of section 2 authorizing the reopening of cases not fully administered.

These views are supported by the opinion in *In re Glory Bottling Co. of New York, Inc.*, (C. C. A. 2d, 1933) 283 Fed. 110, where an involuntary petition having been dismissed with costs, the petitioning creditors some months later made a motion to vacate and for a rehearing. The order of the District Court granting the rehearing was reversed by the Circuit Court of Appeals with the following statement:

> "The situation at bar is somewhat analogous with the question disposed of in Matter of Hollins, 238 Fed. 787, 151 C. C. A. 637, where the court pointed out that after a composition was confirmed the bankruptcy court was without jurisdiction to pass upon claims made by third parties to the property thereafter turned over. In other words, the court held, as the Bankruptcy Act provided, that the title of the bankrupt to his property 'shall thereupon revest in him.' Section 70f (Comp. St. § 9654).
>
> "So, in the case at bar, when the petition was dismissed, all of the proceedings incident to the petition ended, and the property of the bankrupt thereafter became again under his full control. It is, of course, immaterial that at a subsequent date another petition was filed, for such later proceedings cannot in any manner affect the restored status of the alleged bankrupt, created by the dismissal of the first petition.
>
> "The case at bar is entirely distinguishable from that class of cases where a petition has not been dismissed, and is pending, but leave has

> been given to amend the petition; and it is also distinguishable from those cases, where creditors have intervened, as in In re Bolognesi, 223 Fed. 771, 139, C. C. A. 351 and In re Diamond Fuel Co., 283 Fed. 108, decided contemporaneously herewith. * * *"

None of the decisions cited by petitioner are contrary to the views here stated. An order of adjudication, of course, creates a "pending" case, and the statement that such an order may be vacated at a succeeding term[20] is in harmony with the principle that a bankruptcy proceeding is a continuous case until closed. The order confirming a sale by the trustee in bankruptcy in *In re Burr Mfg. & Supply Co.*, (C. C. A. 2nd. 1914) 217 Fed. 16, was an administrative order in the progress of the proceeding. An order committing the bankrupt for contempt, such as was entered in *Freed* v. *Central Trust Co.*, (C. C. A. 7th) 215 Fed. 873, is obviously not a final order disposing of the proceeding.

A bankruptcy case is *sui generis* only to the extent that the procedure therein is made so by the Bankruptcy Act. In other respects it is controlled by the same principles which govern equity practice. This being true, the order which closed the term at which the order of March 2, 1936, was entered, also closed the door to a petition for reconsideration.

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[20] *In re Rochester Sanitarium & Baths Co.*, (C. C. A. 2d.) 222 Fed. 922; also cases cited by petitioner at pages 19-20.

CONCLUSION

Petitioner devotes a large part of its argument to the rule in equity cases that a rehearing may be granted within the term although the appeal period has expired. Neither the rule nor the cases cited in support thereof control the decision of the present case.

Petitioner asserts that in bankruptcy proceedings the jurisdiction to entertain a rehearing does not expire with the appeal period, but that such jurisdiction continues until rights have become vested, relying upon the principle of the *Sandusky* case. Section 25(a) of the Bankruptcy Act, which limits the appeal period for the review of certain orders to thirty days, imposes a similar limit upon the period for reconsideration. Moreover, in the case of a final order dismissing a petition for reorganization and retiring the cause from the docket, if both the appeal period and the term are permitted to expire without application for appeal or rehearing, there is no "pending" proceeding before the Court.

There is no diversity of opinion among the circuit courts of appeal with respect to the issue here presented, for the reason that the present question involves elements not involved in any case heretofore decided. In this proceeding not only had the appeal period expired, but the petition for reorganization had been dismissed and the term had expired.

Points (1) and (2) herein are distinct propositions and cases might arise in which it would be necessary to choose between the two. It is unnecessary to make that choice here. The Circuit Court of Appeals based its ruling upon the first point and respondents believe that both the reasoning and the decision of that court are correct in every particular. The ruling must also stand for the reason that there was no pending cause after the expiration of the term at which the order of March 2, 1936, was entered, and therefore nothing within the breast of the court for its reconsideration.

The order of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

H. D. RUMMEL,
D. O. BLAGG,
A. G. STONE,
Counsel for Owens-Illinois Glass Company and Libbey - Owens - Ford Glass Company, Respondents.

Charleston, W. Va.
December 29, 1936.

APPENDIX A

IN THE

United States Circuit Court of Appeals,

FOR THE THIRD CIRCUIT

No. 5400. March Term, 1934.

SAMUEL W. COOPER, Trustee, American Steamship Navigation Company, by WILLIAM J. F. REYNOLDS, Objecting Creditor,

Appellant,

v.

A. LINCOLN RAUCH, Trading as CONTINENTAL LUMBER COMPANY,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

OPINION

(Filed October 24, 1934)

Before Buffington and Davis, Circuit Judges.

DAVIS, Circuit Judge.

This case is here on a motion of A. Lincoln Rauch, appellee, to dismiss the appeal.

In March, 1920, a petition in bankruptcy was filed against the American Steamship Navigation Company. In due course it was adjudicated a bankrupt and Samuel W. Cooper, Esquire, was appointed receiver and later elected trustee of the estate. On February 2, 1921, and before his election as trustee, he filed a claim for the appellee for damages alleged to have arisen from a breach of a contract to carry lumber to Spain. No action has ever been taken to liquidate this claim. But there was litigation extending seven or eight years by the trustee against a trust company which resulted in the collection of a sum of money in 1929, the year in which the trustee filed his account. The referee in his schedule of distribution mentioned the claim involved here, but instructed appellant's counsel to withhold the checks on the claim. The appellant filed a petition in the District Court asking permission to file exceptions to several claims, among which was the claim here in issue. Permission was given and exceptions were filed and the referee, after taking a great deal of testimony, on July 14, 1932, sustained the exceptions to the claim and ordered it dismissed.

The appellee filed a petition for review which was heard by Judge Kirkpatrick who filed an opinion reversing the order of the referee on the ground of laches of the objecting creditor, and entered an order of February 21, 1933, allowing the claim. The objecting creditor urged the trustee to appeal from the order allowing the claim, but he was then and since filing the claim had been, counsel for the claimant whose interests were hostile to those of the objecting creditor and to other creditors. He had held this dual and inconsistent position ever since his election as trustee and did not appeal, though he filed an offer in compromise which was not accepted.

As the trustee was not making any effort to appeal, although urged to do so, the objecting creditor went to the chambers of Judge Kirkpatrick in Philadelphia within the thirty days allowed for appeal for the purpose of taking an appeal, but learned that the Judge was out of town and would not return for some time. On April 5, 1933, however, after the expiration of thirty days in which the appeal had to be taken, Judge Kirkpatrick did allow an appeal nunc pro tunc.

The trustee filed a motion in this court to dismiss the appeal. It was dismissed on the suggestion that the appellant would apply to the District Court for a reargument. Such application was made and a reargument was had. Thereupon Judge Kirkpatrick wrote an opinion, and later, after consultation with Judge Kirkpatrick, Judge Dickinson entered a decree thereon dismissing the exceptions and allowing the claim. From this order, an appeal was taken to this court.

As we understand it, the merits of the claim have never been passed upon by the court. This should be done if it is legally possible, for the learned District Judge in his opinion said: "The claim is a sizeable one, and a very able referee, after an exhaustive investigation, came to the conclusion that it was entirely without substance."

The real question for us to determine is whether or not a rehearing of a case may be allowed after the time, within which an appeal may be taken, has expired.

The appellee contends in support of his motion, that the District Court has no power to allow a petition for the rehearing of a claim for the simple purpose of extending the time allowed for an appeal of its order. Doubtless, that is a correct contention. Conboy v. First National Bank, 203 U. S. 141; Bonner v. Potterf, 47 Fed. (2d) 852 (C. C. A. 10). Such action would permit the defeat of the intention of section 25 (a) of the Bankruptcy Act, as amended, which provides that appeals in bankruptcy from an order allowing or rejecting a claim must be taken within thirty days after the order has been rendered. 11 U. S. C. A. section 48.

Unlike the law courts, a court of bankruptcy is always open and has no separate terms. In re Burr Manufacturing and Supply Company, 217 Fed. 16 (C. C. A. 2); In re Barker Piano Company, 233 Fed. 522 (C. C. A. 2). The Court retains control over the matters of a bankrupt before it, until the close of the case. Sandusky v. National Bank, 90 U. S. 289; In re Hamilton Automobile Company, 209 Fed. 596 (C. C. A. 7).

It is true that there is a limitation on the power of the bankruptcy court to reconsider claims which have been allowed. Section 57 (k) of the Bankruptcy Act provides that: (11 U. S. C. A. section 93, subdivision k).

> "Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed."

The law was tersely stated by the Circuit Court of Appeals for the Seventh Circuit in the Matter of Stearns and White Company, 295 Fed. 833, 837:

> "We are of opinion that the judgments that may be appealed from under the provisions of section 25a are final judgments; that after the time for appeal has expired, unless a petition for reconsideration has been filed within 10 days, they may not be disturbed, except under the provisions of section 57k."

The appellant's rights are stated in section 57 (k). By it the District Court in its discretion could reconsider for cause the claim here involved. West v. W. A. McLaughlin and Company's Trustee, 162 Fed. 124 (C. C. A. 6); In re El Dorado Ice and Coal Company, 290 Fed. 180 (C. C. A. 8).

In this case before us, the District Court heretofore refused to accept the action of the referee in disallowing the claim on the ground that the objecting creditor was guilty of laches. We are in an anomalous position. The learned District Judge considered it just to give the objecting creditor an opportunity to have this court consider the claim, but at the same time, it was convinced that it had properly disposed of the matter by allowing the claim on the ground that the objecting creditor was barred by laches. The court therefore granted the petition for rehearing in order to allow the objecting creditor an appeal to this court, but at the same time affirmed its order allowing the claim, again refusing to consider the case on its merits because of the laches of the objecting creditor. In doing this, the court

stated that the reasons why its discretion should be exercised in granting the petition for rehearing were as follows:

> "My order allowing the claim was entered upon the sole ground of laches barring the defense offered, and therefore did not feel called upon to pass upon the fact questions raised by the defense. I think that in any case in which the Court feels that the situation precludes a consideration of any phase of what may be called the merits, a review is desirable.
>
> (b) The petitioner has some excuse for failing to appeal within the statutory period. He is not the trustee. The trustee originally presented, as attorney for the claimant, the claim which is not being resisted and represented the claimant over a long period of time. Whether he still continues to do so has not been made entirely clear to me, but at any rate it is easy to see that the Trustee's double position has been a source of embarrassment to the petitioner and other creditors throughout the whole proceeding.
>
> (c) The claim is a sizeable one, and a very able referee, after an exhaustive investigation, came to the conclusion that it was entirely without substance."

We are of the opinion that the claim should have been reconsidered under section 57k and a hearing had on the merits and facts surrounding the claim and the actions of those interested therein. If this was an ordinary case, we would be constrained to dismiss the appeal. But the referee carefully considered the claim on its merits and dismissed it as being entirely without substance. The trustee of the estate has acted in a dual position which was inconsistent and harmful. There has been conduct that is highly suggestive of bad faith and fraud. The trustee delayed action and refused to have the claim brought before this court. This position seems to have been injurious to the interests of the creditors as a whole whom he was elected to represent. His former client is now in this court prosecuting a motion to dismiss the appeal. The trustee's position has apparently been unfair to the creditors and his action improper. His former client now seeks to profit by the conduct of his

attorney which appears to have been wrong and, if it was, he should not be allowed to do so.

All that we have before us touching the merits of the claim is to the effect that it is wholly without substance. If this is so, it should not have been allowed.

The motion to dismiss the appeal is at this time denied.

FILE COPY

JAN 7 1937

In the
Supreme Court of the United States

OCTOBER TERM, 1936

No. 305

WAYNE UNITED GAS COMPANY, *Petitioner*,

vs.

OWENS-ILLINOIS GLASS COMPANY, LIBBEY-OWENS-FORD GLASS COMPANY, ET AL.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

MOTION TO DISMISS WRIT OF CERTIORARI, AND NOTE OF ARGUMENT.

H. D. RUMMEL,
D. O. BLAGG,
A. G. STONE,
Counsel for Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, Respondents.

WOODYARD PRINTERS, CHARLESTON, W. VA.

INDEX

	PAGE
Motion to dismiss writ of certiorari	1
EXHIBIT A, Supplemental decree of sale, Circuit Court of Kanawha County, August 10, 1936	7
EXHIBIT B, Order of Circuit Court filing report of sale, October 3, 1936	14
EXHIBIT C, Order filing exceptions to report, October 14, 1936	16
EXHIBIT C-1, Exceptions to report of sale	19
EXHIBIT C-2, Stipulation filed with exceptions	22
EXHIBIT D, Decree confirming sale, December 2, 1936	25
EXHIBIT E, Decree fixing allowances, December 21, 1936	31
EXHIBIT F, Deed conveying property to purchasers (only caption printed)	40
EXHIBIT G, Final order of Supreme Court of Appeals, entered May 21, 1935, and orders refusing rehearing	41
EXHIBIT H, Order of Supreme Court of Appeals, November 9, 1936, refusing appeal from decree of August 10, 1936	44
Note of argument in support of motion to dismiss	46
Chronology of proceedings	56

TABLE OF CASES CITED IN NOTE OF ARGUMENT

PAGE

A.

American Book Co. v. Kansas, 193 U. S. 49 50

B.

Bell v. Wayne United Gas Co., 116 W. Va. 280, 181 S. E. 609 47

Brownlow v. Schwartz, 261 U. S. 216 51

C.

California v. San Pablo & T. R. Co., 149 U. S. 308 52

D.

Dayton Coal & Iron Co., In re, 291 Fed. 390 53

Duparquet Huot & Moneuse Co. v. Evans, 297 U. S. 216 53

F.

Fairchild v. Hughes, 258 U. S. 126 52

I.

Interstate Commerce Comm. v. Brimson, 154 U. S. 447 52

M.

Maloney v. Condon, 189 U. S. 64 50

Mills v. Green, 159 U. S. 651 50

Murel Holding Corporation, In re, 75 F. (2d) 941 53

S.

State v. Lambert, 52 W. Va. 248 51

Steele, Ex parte, 163 Fed. 694, 701 51

Straton v. New, 283 U. S. 318, 75 L. Ed. 1078 53

Swift & Co. v. United States, 276 U. S. 311 52

U.

United States v. Alaska S. S. Co., 253 U. S. 113 52

TEXT

Robertson & Kirkham,

Jurisdiction of the Supreme Court 51, 52

In the
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OCTOBER TERM, 1936

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WAYNE UNITED GAS COMPANY, *Petitioner*,

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OWENS-ILLINOIS GLASS COMPANY, LIBBEY-OWENS-FORD GLASS COMPANY, ET AL.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

MOTION TO DISMISS WRIT OF CERTIORARI.

Come now the Owens-Illinois Glass Company, a corporation and Libbey-Owens-Ford Glass Company, a corporation, respondents herein, by their counsel, and here move the Court to dismiss the writ of certiorari heretofore granted herein on October 12, 1936, upon the grounds that the questions presented herein at this time are moot, and that by reason of the change in the circumstances of the parties, and especially of the property of the petitioner, no relief can ulti-

mately be granted the petitioner in the pending litigation to which said writ applies.

And as grounds for said motion, and in support of the same, these respondents now aver the following facts and transactions which have occurred since the entry of the final order of the Circuit Court of Appeals herein, since the granting of the writ of certiorari by this Court, and since the docketing of the said writ for hearing at the present term, to-wit:

Respondents aver that on August 10, 1936, the Circuit Court of Kanawha County, West Virginia, entered a decree in the chancery cause of John B. Bell and Commonwealth Gas Corporation vs. Wayne United Gas Company et al., No. 11,668, pursuant to the mandate of the Supreme Court of Appeals of West Virginia upon the appeal of said cause theretofore taken to said Court, by which decree of August 10, 1936, said Circuit Court amended and supplemented the decree of sale theretofore entered by it in said cause on July 13, 1934, and thereupon directed the special commissioners appointed by said original decree of sale to proceed thereunder and make sale of the properties of the Wayne United Gas Company therein decreed to be sold, which properties consisted of all the properties of said company located in the State of West Virginia. Said company owns no other properties except certain gas rights and properties in the State of Kentucky, which are of relatively small value. Said Kentucky properties are chiefly, if not entirely, subject to the first mortgage of said company, and proceedings are pending in the courts of Kentucky for the sale of said properties under the said mortgage. Respondents aver that all said Kentucky properties are worth considerably less than $50,-

000, the total income thereof, from June 21, 1932, to November 19, 1936, having been less than $22,000, while the income of the West Virginia properties for the same period was approximately $800,000. A certified copy of said decree of August 10, 1936, is herewith filed as part of this motion, marked "Exhibit A."

That the Bank of New York & Trust Company, Trustee, the Chemical Bank & Trust Company, Edward F. Moore, Commonwealth Gas Corporation, Wallace G. Berlin, Wert D. Brougher, Robert H. Conlyn, Anna A. Hays, Ellinor B. Hays, Katherine E. Morrison, Philip L. Morrison, Glenn N. Todd, Francis A. Waterhouse and Gertrude Remler Tracy filed their petition with the Supreme Court of Appeals of West Virginia for an appeal from said decree of August 10, 1936, which appeal was, by said Court, denied by its order entered on the 9th day of November, 1936.

That on October 1, 1936, said special commissioners, having duly advertised the sale of said properties under said decree of sale, as amended and supplemented as aforesaid, made sale of the same at public auction as provided by said decree, at which sale H. G. Phillipps became the purchaser of all of said property at the price of $1,225,500; which sale was duly reported to said Circuit Court by said special commissioners on October 3, 1936. Exceptions to said sale were filed by said Bank of New York & Trust Company, Trustee, and others, including said Wayne United Gas Company, on October 14, 1936, which exceptions were duly heard, and on December 2, 1936, said Circuit Court of Kanawha County overruled the said exceptions and confirmed the said sale. Certified copies of the orders of said Court entered on October 3, 1936, filing the report of said sale, on October 14,

1936, filing the exceptions to said report, and on December 2, 1936, confirming said sale, are hereto annexed as parts of this motion, marked, respectively, "Exhibit B," "Exhibit C," and "Exhibit D." True copies of said exceptions and of the stipulation filed therewith are likewise annexed hereto, marked "Exhibit C-1" and "Exhibit C-2."

That on December 21, 1936, by decree then made and entered, said Circuit Court fixed the amounts of certain allowances to be paid out of the purchase money arising from said sale, and directed the special commissioners to collect the said purchase money and deliver deed to the purchaser, or his nominees, and on December 21, 1936, said special commissioners, pursuant to the said decree, executed and delivered to Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, as nominees of said H. G. Phillipps, a deed of conveyance for all the said properties of Wayne United Gas Company sold by them under decree of said Circuit Court as aforesaid, and said grantees have accepted the said deed and have taken said properties into their possession. A certified copy of said decree of December 21, 1936, is herewith filed as part of this motion, marked "Exhibit E," and a true copy of said deed of conveyance is likewise filed as part of this motion, marked "Exhibit F."

A certified copy of the final order of said Supreme Court of Appeals of West Virginia, entered on the 21st day of May, 1935, upon appeal from the decree of sale entered by said Circuit Court of Kanawha County on July 13, 1934, as well as the orders of said Supreme Court of Appeals refusing a rehearing of said final order, are filed herewith as parts of this motion, marked "Exhibit G;" and a certified copy of the order of said Supreme Court of Appeals entered

on November 9, 1936, refusing an appeal from said order of the Circuit Court of Kanawha County entered on August 10, 1936, is herewith filed as part of this motion, marked "Exhibit H."

That under the laws of the State of West Virginia any party aggrieved by a final or appealable decree of said Circuit Court of Kanawha County may, within eight months from the entry of such decree, present a petition to the Supreme Court of Appeals of said State for an appeal from such decree, and the appeal so prayed for may be granted or denied in the discretion of said Supreme Court of Appeals.

Wherefore, these respondents aver that all title and interest in said West Virginia properties have passed from said Wayne United Gas Company, and by reason thereof no reorganization of said company can be had in the manner proposed by it in its several petitions filed in this bankruptcy proceeding or otherwise; and that said proceeding is therefore moot and without avail to benefit the petitioner in any manner.

These respondents therefore respectfully pray that the writ of certiorari heretofore granted herein on October 12, 1936, may be dismissed, with costs to these respondents, and for such other, further and general relief as the case may require.

OWENS-ILLINOIS GLASS COMPANY
LIBBEY-OWENS-FORD GLASS COMPANY
By Counsel.

H. D. RUMMEL,
D. O. BLAGG,
A. G. STONE,
Counsel for Respondents.

STATE OF OHIO,
COUNTY OF LUCAS, TO-WIT:

H. G. Phillipps, a credible person, being duly sworn, upon oath says that he is Vice-President of Owens-Illinois Glass Company, one of the respondents named in the foregoing motion, and is familiar with the contents thereof; that the facts and allegations therein contained are true, except so far as they are therein stated to be upon information and belief, and that so far as they are therein stated to be upon information, he believes them to be true.

H. G. PHILLIPPS.

Taken, subscribed and sworn to before me in my said county, this 30th day of December, 1936, as witness my hand and official seal.

(NOTARIAL SEAL) HELEN G. MYERS,
Notary Public for Lucas County, Ohio.

My commission expires August 25, 1937.

EXHIBIT A.

(STATE OF WEST VIRGINIA,
At a Circuit Court of Kanawha County held at the Court House thereof on the 10th day of August, 1936.)

JOHN B. BELL and)
COMMONWEALTH GAS CORPORATION,)
a Corporation,)
vs.) IN CHANCERY
) No. 11,668
WAYNE UNITED GAS COMPANY,)
a Corporation,)
THE CHASE NATIONAL BANK OF)
THE CITY OF NEW YORK, a)
Corporation, *Trustee*, and)
PAUL C. BEARDSLEE, *Trustee, et als.*)

SUPPLEMENTAL DECREE OF SALE

The Court, having maturely considered the mandate of the Supreme Court of Appeals heretofore certified to this Court, the evidence and all the record heretofore taken and filed herein, the several matters arising upon the submission of this cause by the order entered herein on the 28th day of July, 1936, and the arguments of counsel thereon, is of opinion, and doth accordingly find and decree, for reasons stated in writing and now ordered to be filed as part of the record herein, marked "COURT'S FINDING PURSUANT TO MANDATE OF SUPREME COURT," that the Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company did not breach the gas purchase contract between them and the Wayne United Gas Company, dated the 5th day of June, 1929, mentioned and described in the proceedings herein, nor did either of said Glass Com-

panies breach the same, during the period covered by the evidence taken herein, namely, between the date of the making of said contract and the 1st day of January, 1934; and the Court is further of opinion that no amount is due from said Glass Companies, or either of them, to the Wayne United Gas Company or to the receivers of said company for additional gas which said Glass Companies should have taken or paid for under said contract during the period above mentioned.

It is, therefore, ordered, adjudged and decreed that the several intervening petitions heretofore filed herein by the Bank of New York and Trust Company, the Chemical Bank and Trust Company, Edward F. Moore and Commonwealth Gas Corporation, and by Wallace G. Berlin, et al., in so far as the same ask for a determination of the amount due from said Glass Companies by reason of the breach of said contract, or for natural gas which said companies should have taken or paid for during the period aforesaid, as well as the several motions of the same parties made for the same purpose, be and the same are hereby denied and overruled, and that said respective petitions and motions be and stand dismissed as heretofore decreed; and that the said defendants in said petitions recover their costs in and about their behalves in this cause expended in resisting said petitions; to which action of the Court in finding and decreeing as aforesaid the said Bank of New York and Trust Company, Trustee, The Chemical Bank and Trust Company, Edward F. Moore and Commonwealth Gas Corporation, and Wallace G. Berlin, et al., objected and excepted.

And in accordance with the findings and this decree and the decrees herein made, upon motion of Messrs. Brown,

Jackson and Knight, attorneys for the defendants, The Chase National Bank of the City of New York and Paul C. Beardslee, as Trustee under the First Mortgage, dated June 1, 1929, of Wayne United Gas Company, it is further ordered, adjudged and decreed that the decree of sale heretofore entered in this cause on the 13th day of July, 1934, be and the same is hereby amended and supplemented (pursuant to authority reserved in Article XXI of said decree) in Subdivision V, Lot One, of Article IV of said decree, so that the second paragraph of said Subdivision shall read as follows:

"The Company's interest in said contract includes every right and claim to moneys becoming or which may have become due or payable under said contract, and remaining unpaid at the time of the delivery of possession of the property included in this Lot One as in this decree provided."

It is further ordered, adjudged and decreed that said decree of sale heretofore entered in this cause on the 13th day of July, 1934, be amended and supplemented by changing the advertisement of sale annexed to said decree of sale as Schedule A, by inserting an appropriate reference to this order and making appropriate changes in the dates included in said Schedule A.

It is further ordered, adjudged and decreed that H. Rummel Anderson and Thomas B. Jackson, heretofore appointed as Special Commissioners for the purpose, do proceed under said decree of July 13, 1934, to make sale of the properties therein decreed to be sold, in all respects as therein provided, except as in this decree amended and supplemented, and to perform and carry out all the provisions of said former decree of sale.

The Wayne United Gas Company suggests, upon the record, that it, as Debtor, heretofore filed its petitions in the District Court of the United States for the Southern District of West Virginia, praying, among other things, that said District Court find that its said petitions comply with Section 77-B of the Bankruptcy Act of the United States (providing for corporate reorganization), and the same filed in good faith, and praying said District Court to approve the same as properly filed under said section of said Act, and for all such other and further relief to which said Debtor may be entitled; that said petitions were disapproved and dismissed by said District Court by two decrees, the last of said decrees having been entered on the 28th day of May, 1936; that an appeal was allowed by said District Court on the 11th day of June, 1936, with supersedeas, from the said decree entered on the 28th day of May, 1936, to the United States Circuit Court of Appeals for the Fourth Circuit; that the transcript of the record upon such appeal was filed in said United States Circuit Court of Appeals for the Fourth Circuit on the 30th day of June, 1936, and the cause on that day docketed; that a motion was made by the Glass Companies on the said 30th day of June, 1936, in the United States Circuit Court of Appeals for the Fourth Circuit, to dismiss the appeal allowed by said District Court on the said 11th day of June, 1936, nd that the said United States Circuit Court of Appeals, on the 4th day of July, 1936, dismissed said appeal; that the said Wayne United Gas Company intends to file in the Supreme Court of the United States a petition for certiorari, as provided by the statutes of the United States in such cases made and provided, and in accordance with the rules of the Supreme Court of the United States; and that an order was filed in the said United States Circuit Court of Appeals for the Fourth Circuit, on the 28th

day of July, 1936, staying the mandate of said United States Circuit Court of Appeals for the Fourth Circuit, pending the application of the Wayne United Gas Company, as appellant, in the Supreme Court of the United States for a writ of certiorari to said United States Circuit Court of Appeals for the Fourth Circuit, unless otherwise ordered by said United States Circuit Court of Appeals, or the said Supreme Court of the United States, providing said application is filed in said Supreme Court of the United States within thirty (30) days from said 28th day of July, 1936. And because of such suggestion upon the record, said Wayne United Gas Company moved the Court to direct the Special Commissioners, H. Rummel Anderson and Thomas B. Jackson, appointed as such by the decree entered herein on the 13th day of July, 1934, to make sale of the property therein decreed to be sold, to take no proceedings thereunder, or hereunder, until the Supreme Court of the United States has acted upon the movant's application for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit, for a review of said order of dismissal entered on the 4th day of July, 1936; to which suggestion the Glass Companies and the above named Trustees objected, and the same parties resisted the said motion. And the Court, having maturely considered said motion, is of opinion to overrule the same, and doth accordingly so adjudge, order and decree. To which action of the Court in overruling its said motion, the said Wayne United Gas Company objected and excepted.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, M. H. HIX, Clerk of the Circuit Court for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 14th day of December, 1936.

M. H. HIX, *Clerk Circuit Court,*
Kanawha County, West Virginia.

(SEAL)

STATE OF WEST VIRGINIA,
KANAWHA COUNTY, TO-WIT:

I, A. P. HUDSON, sole judge of the Circuit Court in and for the County of Kanawha, in the State of West Virginia, do certify that M. H. Hix, by whom the aforesaid record and certificate were made and given, and who in his own handwriting has thereunto subscribed his name and has thereto affixed the seal of the Circuit Court in and for the County of Kanawha, in the State of West Virginia, was at the time of so doing, and now is Clerk of said Circuit Court in and for said County, to all whose acts as such full faith and credit are due and given, and that the said record and certificate are in due form and made by the proper officer.

In testimony whereof, I have hereunto set my hand this fourteenth day of December, in the year of our Lord one thousand nine hundred and thirty-six.

A. P. HUDSON,
Judge of the Circuit Court of
Kanawha County, West Virginia.

STATE OF WEST VIRGINIA,
KANAWHA COUNTY, TO-WIT:

I, M. H. HIX, Clerk of the Circuit Court in and for the County of Kanawha, in the State of West Virginia, do hereby certify that the Honorable A. P. Hudson, by whom the foregoing certificate was made and given, and who in his own proper handwriting has thereunto subscribed his name, was at the time of so doing, and now is sole Judge of the Circuit Court in and for the County of Kanawha, in the State of West Virginia, duly commissioned and qualified, to all whose acts as such full faith and credit are due and given as well as in court of adjudicature as elsewhere.

In testimony whereof, I have hereunto set my hand and seal of said Circuit Court, this 14th day of December, A. D. 1936.

M. H. HIX,
Clerk of Circuit Court of
Kanawha County, West Virginia.

(SEAL)

EXHIBIT B.

(STATE OF WEST VIRGINIA,

At a Circuit Court of Kanawha County held at the Court House thereof on the 3rd day of October, 1936.)

JOHN B. BELL and COMMONWEALTH GAS CORPORATION, a Corporation,	)	
vs.	)	IN CHANCERY
	)	No. 11,668
WAYNE UNITED GAS COMPANY, a Corporation, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a Corporation, *Trustee*, and PAUL C. BEARDSLEE, *Trustee*.	)	

This 3rd day of October, 1936, came H. Rummel Anderson and Thomas B. Jackson, Special Commissioners, heretofore appointed in this cause, pursuant to the terms of Article XVI of a decree of this Court, entered the 13th day of July, 1934, and came also the plaintiffs, by counsel, and the defendants, The Chase National Bank of the City of New York and Paul C. Beardslee, as Trustees under the first mortgage of Wayne United Gas Company, dated June 1, 1929, by counsel; Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company by counsel; and petitioners, The Bank of New York and Trust Company, Trustee, et als. and Wallace G. Berlin, et als., by counsel. Thereupon said Special Commissioners tendered their report of sale which is ordered filed, and counsel for said The Bank of New York and Trust Company, Trustee, et als. and Wallace G. Berlin, et als. announced to the Court their intention of filing objections and exceptions to said report of sale

and moved the Court to allow them time within which to file said objections and exceptions; upon consideration of which, it is adjudged, ordered and decreed that this cause be, and the same is hereby continued to the 14th day of October, 1936, at 12:00 o'clock noon within which time said parties may file such objections and exceptions, and for a hearing upon said report and said objections and exceptions and all other matters arising upon said report of sale or otherwise coming before the Court in this cause.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, M. H. HIX, Clerk of the Circuit Court for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 14th day of December, 1936.

M. H. HIX,
Clerk Circuit Court,
Kanawha County, West Virginia.

(SEAL)

(Authentication omitted in printing; same as certificates to Exhibit A.)

EXHIBIT C.

(STATE OF WEST VIRGINIA,
At a Circuit Court of Kanawha County held at the Court House thereof on the 14th day of October, 1936.)

JOHN B. BELL and COMMONWEALTH GAS CORPORATION, a Corporation,	)	
vs.	)	IN CHANCERY
	)	No. 11,668
WAYNE UNITED GAS COMPANY, a Corporation, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a Corporation, *Trustee*, PAUL C. BEARDSLEE, *Trustee*.	)	

This cause came on this 14th day of October, 1936, to be further heard, pursuant to the order entered herein on the 3rd day of October, 1936, and thereupon came The Bank of New York & Trust Company, Trustee, et al and the Wayne United Gas Company, by Blue, Dayton & Campbell and Price, Smith & Spilman, their attorneys, and tendered and asked leave to file their written objections to the confirmation of the sale made by H. Rummel Anderson and Thomas B. Jackson, Special Commissioners, to H. G. Phillips, on the 1st day of October, 1936, of those certain properties of the said Wayne United Gas Company, referred to as Parcel C in the report of sale heretofore made by said Special Commissioners and filed in this cause, for the reasons and upon the grounds as set forth in said written objections, which written objections, for identification, are marked "Objections of The New York Bank & Trust Company et als and Wayne United Gas Company to Confirmation of Special Commis-

sioners' Sale Made October 1, 1936" and the said The Bank of New York & Trust Company, Trustee, et al, and the Wayne United Gas Company also tendered and asked leave to file a certain written stipulation and agreement made and signed by The Bank of New York & Trust Company, Wayne United Gas Company et al, by Blue, Dayton & Campbell, their attorneys, Owens-Illinois Glass Company, Libbey-Owens-Ford Glass Company, by H. D. Rummel, their attorney, and The Chase National Bank of the City of New York, and Paul C. Beardslee, Trustees, by Thomas B. Jackson, their attorney, dated October 14, 1936, which stipulation and agreement, for identification, is marked "Stipulations. October 14, 1936." And thereupon leave to file the said objections to the confirmation of the aforesaid sale, and the said stipulation and agreement of the aforesaid parties was, and the same is hereby, given, and said objections and said stipulations, marked for identification as aforesaid, and each of them, were ordered to be filed, and the same accordingly are filed: And thereupon Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, by H. D. Rummel, their attorney, and The Chase National Bank of the City of New York and Paul C. Beardslee, as Trustee, by Thomas B. Jackson, their attorney, moved the Court to confirm the aforesaid sale made by said Special Commissioners, H. Rummel Anderson and Thomas B. Jackson, to H. G. Phillips, on the 1st day of October, 1936, and to approve and confirm the report of said Commissioners heretofore filed by them.

And the Court, after having heard the arguments of counsel upon the aforesaid objections to the confirmation of the aforesaid sale and upon the aforesaid motion for con-

firmation of the said sale, takes time to consider of its order or decree in respect thereof.

This order to be entered as of the 14th day of October, 1936.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, M. H. HIX, Clerk of the Circuit Court for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 14th day of December, 1936.

M. H. HIX,
Clerk Circuit Court,
Kanawha County, West Virginia.

(SEAL)

(Authentication omitted in printing; same as certificates to Exhibit A.)

EXHIBIT C-1.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA.

JOHN B. BELL and COMMONWEALTH GAS CORPORATION, a Corporation, *Plaintiffs,*	)	
v.	)	IN CHANCERY No. 11,668
WAYNE UNITED GAS COMPANY, a Corporation, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a Corporation, *Trustee,* and PAUL C. BEARDSLEE, *Trustee, et als,* *Defendants,*	)	

The New York Bank & Trust Company et al and the Wayne United Gas Company object to the confirmation of the sale made by H. Rummel Anderson and Thomas B. Jackson, Special Commissioners, to H. G. Phillips, on the 1st day of October, 1936, of those certain properties referred to as Parcel C, in their report of sale heretofore filed in this cause, for the following reasons and upon the following grounds:

(1) That the Supreme Court of the United States on the 12th day of October, 1936, granted a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit in the proceeding of *Wayne United Gas Company, a corporation, petitioner, v. Owens-Illinois Glass Company, Libbey-Owens-Ford Glass Company, The Chase National Bank of the City of New York, a corporation, and Paul C.*

Beardslee, Trustees, respondents, October Term, 1936, No. 305, to review a decree of said Circuit Court of Appeals entered in said proceeding on the 4th day of July, 1936, dismissing the appeal of said Wayne United Gas Company from an order of the District Court of the United States for the Southern District of West Virginia, made on the 28th day of May, 1936, dismissing the Original Petition, Amended and Supplemental Petition, and Second Amended and Supplemental Petition of said Wayne United Gas Company, filed in said District Court, for reorganization of Wayne United Gas Company under Section 77B of the Bankruptcy Act. A printed copy of the transcript of the record of the said proceeding in the Supreme Court of the United States is this day filed with the papers in this cause, marked for identification "Exhibit Transcript of Record."

That H. G. Phillips, the highest bidder for the property offered for sale, as Parcel C, at the said sale made by H. Rummel Anderson and Thomas B. Jackson, Special Commissioners, on the 1st day of October, 1936, and as reported by said Commissioners, is Vice-President of the Owens-Illinois Glass Company, and that his bid was made for the defendants, Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company.

(2) That The Bank of New York & Trust Company, as Trustee, and others, presented to, and filed their petition in, the Supreme Court of Appeals of West Virginia, on the 29th day of September, 1936, praying therein for an appeal from and supersedeas to the decree entered by the Circuit Court of Kanawha County, on the 10th day of August, 1936, a copy of which petition is filed with the papers in this cause in the office of the Clerk of said Circuit Court: That

the said Supreme Court of Appeals has not, as of this 14th day of October, 1936, announced its action upon said petition.

(3) That the sum of $1,225,500.00, the bid of said H. G. Phillips, is inadequate as will appear from the record in this cause, including the fact that there is in the hands of the Special Receivers, heretofore appointed by this Court, in cash, the sum of $546,726.02; and that the said Special Receivers have receivables due to them, for gas delivered to the aforesaid two Glass Companies, as of October 14, 1936, the approximate sum of $18,000.00. That said cash and receivables, less the costs of this suit and such allowances as the Circuit Court of Kanawha County shall make, are included in the aforesaid Parcel C.

Respectfully submitted,

THE NEW YORK BANK & TRUST COMPANY,
WAYNE UNITED GAS COMPANY, *et al.*,
Petitioners

By BLUE, DAYTON & CAMPBELL,
PRICE, SMITH & SPILMAN,
Their Attorneys.

October 14, 1936.

EXHIBIT C-2.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JOHN B. BELL and COMMONWEALTH GAS CORPORATION, a Corporation, *Plaintiffs*,	)	
v.	)	IN CHANCERY
	)	No. 11,668
WAYNE UNITED GAS COMPANY, a Corporation, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a Corporation, *Trustee*, and PAUL C. BEARDSLEE, *Trustee, et als*, *Defendants*,	)	

It is stipulated and agreed between the parties hereto as follows:

(1) That the Supreme Court of the United States on the 12th day of October, 1936, granted a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit in the proceeding of *Wayne United Gas Company*, a corporation, petitioner, v. *Owens-Illinois Glass Company, Libbey-Owens-Ford Glass Company, The Chase National Bank of the City of New York, a corporation, and Paul C. Beardslee, Trustees, respondents, October Term, 1936*, No. 305, to review a decree of said Circuit Court of Appeals entered in said proceeding on the 4th day of July, 1936, dismissing the appeal of said Wayne United Gas Company from an order of the District Court of the United States for the Southern District of West Virginia, made on the 28th day of May, 1936, dismissing the Original Petition, Amend-

ed and Supplemental Petition, and Second Amended and Supplemental Petition of said Wayne United Gas Company, filed in said District Court, for reorganization of said Wayne United Gas Company under Section 77B of the Bankruptcy Act. A printed copy of the transcript of the record of said proceeding in the Supreme Court of the United States is attached hereto, marked "Exhibit Transcript of Record."

(2) That H. G. Phillips, the highest bidder for the property offered for sale as Parcel C, at the sum of $1,225,500.00, at the sale made by H. Rummel Anderson and Thomas B. Jackson, Special Commissioners, on the 1st day of October, 1936, and as reported by said Commissioners to the Circuit Court of Kanawha County, is Vice-President of the Owens-Illinois Glass Company, and that his bid was made for the defendants, Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company.

(3) That The Bank of New York & Trust Company, as Trustee, and others, presented to, and filed their petition in, the Supreme Court of Appeals of West Virginia on the 29th day of September, 1936, praying therein for an appeal from and supersedeas to the decree entered by the Circuit Court of Kanawha County on the 10th day of August, 1936, a copy of which petition is filed in the office of the Clerk of the Circuit Court of Kanawha County with the papers in the cause styled in the caption hereof. That said Supreme Court of Appeals has not, as of this 14th day of October, 1936, announced its action upon said petition.

(4) That there is in the hands of the Special Receivers appointed by the Circuit Court of Kanawha County by a

decree heretofore entered in the suit styled in the caption hereof, the cash sum of $546,726.02; and that the said Special Receivers have receivables due to them, for gas delivered to the aforesaid two Glass Companies, as of October 14, 1936, the approximate sum of $18,000.00. That said cash and receivables, less the costs of this suit and such allowances as the Circuit Court of Kanawha County shall make, are included in the aforesaid Parcel C.

(5) In making the foregoing stipulations, the Owens-Illinois Glass Company, the Libbey-Owens-Ford Glass Company, and the Chase National Bank of the City of New York and Paul C. Beardslee, Trustees, do not admit the competency or relevancy of any of the facts so stipulated, or waive any objection thereto, but make this stipulation solely for the purpose of obviating the proof, or offer of proof thereof by the undersigned petitioners.

THE BANK OF NEW YORK & TRUST COMPANY,
WAYNE UNITED GAS COMPANY, *et al*,
Petitioners,

By BLUE, DAYTON & CAMPBELL,
PRICE, SMITH & SPILMAN,
Their Attorneys,

OWENS-ILLINOIS GLASS COMPANY,
LIBBEY-OWENS-FORD GLASS COMPANY
By H. D. RUMMEL,
Their Attorneys,

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK and PAUL C. BEARDSLEE, *Trustees*,
By THOMAS B. JACKSON,
Their Attorneys.

October 14, 1936.

EXHIBIT D.

(STATE OF WEST VIRGINIA,

At a Circuit Court of Kanawha County held at the Court House thereof on the 2nd day of December, 1936.)

JOHN B. BELL and COMMONWEALTH GAS CORPORATION, a Corporation,	)	
vs.	)	IN CHANCERY
	)	No. 11,668
WAYNE UNITED GAS COMPANY, a Corporation, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a Corporation, *Trustee*, PAUL C. BEARDSLEE, *Trustee, et als.*	)	

The Court having maturely considered the report of sale of H. Rummel Anderson and Thomas B. Jackson, heretofore appointed Special Commissioners in this cause, under a decree of sale entered the 13th day of July, 1934, which said report of sale was filed herein the 3rd day of October, 1936, and the objections filed thereto by The Bank of New York and Trust Company, Trustee, et als, and by the defendant, Wayne United Gas Company, and it appearing to the Court that the sale of the property mentioned and described, and reported as sold, in said report of sale, was duly made and had pursuant to the terms and provisions of said decree of sale, as amended and supplemented by a certain supplemental decree of sale entered in this cause the 10th day of August, 1936; that the bid made and offered for sale Parcel C, as mentioned and described in said report of sale, is fair and adequate; that the petition for an appeal

filed by said The Bank of New York and Trust Company, Trustee, and others in the Supreme Court of Appeals of West Virginia, as mentioned and described in section (2) of said objections, was refused by said Court on the 9th day of November, 1936; and that said report of sale conforms in every respect to the requirements of said decree of sale, as amended and supplemented, as aforesaid, it is therefore,

ADJUDGED, ORDERED AND DECREED, as follows:

(1) The said objections of said The Bank of New York and Trust Company, et als and of Wayne United Gas Company are hereby overruled.

(2) Said Report of sale is hereby ratified, approved and confirmed.

(3) In accordance with Article XVII of said decree of sale:

(a) H. G. Phillips, the purchaser of said Sale Parcel C, as reported in said report of sale, or his assignee, shall pay the amount bid by him for said Sale Parcel C, to-wit, the sum of One Million Two Hundred and Twenty-Five Thousand Five Hundred Dollars ($1,225,500.00) within twenty (20) days after the date of this decree.

(b) Said H. G. Phillips, having deposited the sum of Twenty-Two Thousand Dollars ($22,000.00) in cash with said Special Commissioner, pursuant to Paragraph 1 of Article XIV of said decree of sale, which said sum of Twenty-Two Thousand Dollars ($22,000.00) is to be credited on the purchase price of said Sale Parcel C under the terms

of Paragraph 8 of said Article XIV of said decree of sale, or his assignee, shall make such further cash payment or payments on account of the purchase price of said Sale Parcel C as shall be sufficient, together with the amount of any such deposit, to pay in full the sum of Twenty-Five Thousand Five Hundred Dollars ($25,500.00) (being the proceeds of Sale Parcel B as hereinafter determined) plus the items specified in sub-divisions First, Second and Third of Paragraph 1 of Article XIX of said decree of sale, and shall be entitled either to pay the balance of the bid of said H. G. Phillips in cash or to satisfy or make good such balance in whole or in part by turning in to said Special Commissioners to be credited at their distributive value, as determined under Paragraph 3 of said Article XVII, First Mortgage Bonds of said Wayne United Gas Company in bearer form, entitled to payment out of the proceeds of sale of Sale Parcel A, as mentioned and described in said report of sale.

(c) The Court reserves a paramount lien and charge upon the property contained in said Sale Parcel C, as set out in Paragraph 4 of said Article XVII.

(4) In accordance with Article XVIII of said decree of sale:

(a) Upon payment of the purchase price by said H. G. Phillips, or his assignee as aforesaid, or so much thereof as may be required to be paid in cash and upon making provision for any balance due, as provided in this decree, said Special Commissioners shall execute and deliver a deed or deeds and other instrument or instruments conveying or assigning and transferring to said H. G. Phillips, or his assignee, the property included in said Sale Parcel C.

(b) The Chase National Bank and Paul C. Beardslee, as Trustees under the First Mortgage of said Wayne United Gas Company, shall by way of further assurance, join with said Special Commissioners in the execution of said deed or deeds and other instrument or instruments, and shall thereby release and quit-claim to said H. G. Phillips, or his assignee, all their right, title and interest, as Trustees as aforesaid, in and to the property included in said Sale Parcel C.

(c) Ross B. Thomas and Herman Bennett, heretofore appointed as Special Receivers in this cause, shall, by way of further assurance, join with said Special Commissioners in the execution of said deed or deeds and other instrument or instruments, and shall thereby convey, transfer, assign and release to the said H. G. Phillips, or his assignee, all their right, title and interest, as such receivers, in and to the property included in said Sale Parcel C.

(5) In accordance with Article XIX of said decree of sale the proceeds of sale of said Sale Parcel C and cash held by the Trustee under said First Mortgage shall be applied as prescribed under said Article XIX.

(6) In accordance with Article XX of said decree of sale, in case the proceeds of the sale of the property by said decree of sale directed to be sold, together with the cash in the hands of said Chase National Bank, as Trustee under said First Mortgage, shall not be sufficient, when applied in accordance with the provisions of said decree of sale and of the order or orders hereafter to be made and of any order or decree made in the ancillary suit in this cause, pending in the Circuit Court of the 37th District of the County of Morgan, State of Kentucky, which may be made with respect

to the proceeds of sale of the property under the jurisdiction of said Kentucky Court, to pay in full the amount in Paragraph 8 of Section A of Article III of said decree of sale found to be due and payable in respect of said First Mortgage Bonds for principal and interest, with interest on said amount from the date of said decree of sale to the date fixed for payment at the rate of 6½% per annum, then said Special Commissioners shall report to the Court the amount of any such deficiency and said Trustees shall have judgment against said Wayne United Gas Company for the amount of such deficiency.

(7) Said Special Commissioners shall in all other respects comply with the terms of said decree of sale respecting action to be taken by them subsequent to this decree confirming said sale.

(8) The proceeds of the sale of Sale Parcel A are hereby determined to be One Million Two Hundred Thousand Dollars ($1,200,000.00), and the proceeds of the sale of Sale Parcel B are hereby determined to be Twenty-Five Thousand Five Hundred Dollars ($25,500.00).

(9) This cause shall be and the same is hereby continued to the 8th day of December, 1936, at 10:30 o'clock A. M. for a hearing to determine the amounts to be paid from the proceeds of the sale on account of the compensation and expenses of the Special Commissioners, the compensation and expenses of the Receivers in this cause and their counsel and the compensation and expenses of the Trustees under the First Mortgage and their counsel and to determine the respective amounts thereof to be apportioned and charged against the proceeds of sale of Sale Parcels A and B,

respectively, and for such further proceedings as may be proper.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, M. H. HIX, Clerk of the Circuit Court for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 14th day of December, 1936.

M. H. HIX,
Clerk Circuit Court,
Kanawha County, West Virginia.

(SEAL)

(Authentication omitted in printing; same as certificates to Exhibit A.)

EXHIBIT E.

(STATE OF WEST VIRGINIA,

At a Circuit Court for Kanawha County held at the Court House thereof on the 21st day of December, 1936.)

JOHN B. BELL and COMMONWEALTH GAS CORPORATION	)	
vs.	)	IN CHANCERY
	)	No. 11,668
WAYNE UNITED GAS COMPANY, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, *Trustee*, and PAUL C. BEARDSLEE, *Trustee*.	)	

On the 8th day of December, 1936, this cause came on again to be further heard pursuant to the decree entered herein on the 2d day of December, 1936; and thereupon the following named parties tendered their several petitions for allowances herein, which are now ordered to be filed, namely:

(1) Petition of the Chase National Bank of the City of New York and Paul C. Beardslee, as trustees under Wayne United Gas Company first mortgage, dated June 1, 1929, for allowance of compensation for their services as such trustees.

(2) Petition of the law firms of Milbank, Tweed, Hope & Webb, and Brown, Jackson & Knight, as attorneys for the Chase National Bank of the City of New York and Paul C. Beardslee, Trustees, for allowance of compensation for their services as such attorneys, and for reimbursement of expenses paid by them.

(3) Petition of Ross B. Thomas and Herman Bennett, as receivers of Wayne United Gas Company, for allowance of compensation for their services as such receivers.

(4) Petition of the law firms of Koontz, Hurlbutt & Revercomb, and Brown, Jackson & Knight, as attorneys for Herman Bennett and Ross B. Thomas, Receivers of Wayne United Gas Company, for allowance of compensation for their services as such attorneys.

(5) Petition of H. Rummel Anderson and Thomas B. Jackson, as special commissioners appointed herein to make sale of the properties of the defendants company decreed to be sold, for allowance of compensation for their services as such special commissioners, and for reimbursement of expenses paid by them.

And all the petitions aforesaid having been fully considered by the Court, together with the arguments of counsel thereon, the Court is now of opinion to and doth hereby make the following allowances to said parties, respectively, to be taxed as costs herein and paid by said special commissioners out of the proceeds of sale of the properties of the defendant Wayne United Gas Company sold herein, in the manner hereinafter set out, namely:

(1) To the Chase National Bank of the City of New York and Paul C. Beardslee, Trustees, compensation for services	$ 3,250.00
(2) To the firms of Milbank, Tweed, Hope & Webb, and Brown, Jackson & Knight, attorneys, for services to said trustees	22,500.00

To Milbank, Tweed, Hope & Webb, for reimbursement of expenses paid by them		1,844.78
To Brown, Jackson & Knight, for reimbursement of expenses paid by them		613.18
(3) To Ross B. Thomas and Herman Bennett, Receivers, for compensation for their services		25,000.00
(4) To the firms of Koontz, Hurlbutt & Revercomb, and Brown, Jackson & Knight, attorneys, for services to said receivers		10,000.00
(5) To H. Rummel Anderson and Thomas B. Jackson, special commissioners, for compensation for their services		12,250.00
To said H. Rummel Anderson and Thomas B. Jackson, special commissioners, for reimbursement of expenses, as follows:		
Advertising sale	$1,065.20	
Stamps for deed, estimated	651.00	
Incidental, estimated	100.00	1,816.20
Total		$77,274.16

The several allowances above made, for services rendered by the receivers, by their attorneys, and by the special commissioners shall be divided equally between the respective parties entitled to said allowances, and so paid by the special commissioners; and the several allowances above made to the trustees and their attorneys for their services shall be paid to said respective parties jointly, and shall be divided among the persons entitled thereto in such manner as they shall agree.

And the Court doth now further find and decree that the above stated allowances shall be apportioned to and paid out of the proceeds of the sale of "Sale Parcel A" and "Sale Parcel B," respectively, of the properties sold by said special commissioners, as follows:

	Total	Parcel A	Parcel B
Trustees	$ 3,250.00	$ 3,250.00	$ 00
Counsel for trustees	22,500.00	22,500.00	00
Expenses of counsel	1,844.78	1,844.78	00
Do	613.18	613.18	00
Receivers	25,000.00	24,479.80	520.20
Counsel for receivers	10,000.00	9,791.90	208.10
Special Commissioners	12,250.00	11,995.10	254.90
Expenses of Commissioners	1,065.20	1,043.00	22.20
Do	651.00	651.00	00
Do	100.00	100.00	00
	$77,274.16	$76,268.76	$ 1,005.40

And it appearing that the sale price of the properties sold herein and designated as "Sale Parcel A" was $1,200,000.00, and that the several allowances and costs to be paid therefrom amount to the sum of $77,274.16, as above shown, the Court doth further find that the residue of said sale price, to-wit, the sum of $1,123,731.24, will be available for distribution to the respective holders of the first mortgage bonds of the Wayne United Gas Company; and it further appearing that the principal amount of said bonds outstanding is the sum of $1,464,000.00, the Court doth now further find and decree that the sum of $767.576 is the distributive amount payable upon each $1,000.00 face or par value of said bonds, (provided such bonds shall have attached thereto the unpaid interest coupon due on June 1, 1932, and all coupons due subsequent thereto), arising from

the proceeds of the mortgaged property sold herein as aforesaid. It is therefore adjudged, ordered and decreed that the purchaser of said property, or his assignees, be permitted to tender such first mortgage bonds of said Wayne United Gas Company, with coupons attached as aforesaid, in payment for said property in "Sale Parcel A" at the said rate of $767.576 per $1,000.00 face value, and that such bonds shall be received by said special commissioners in payment therefor at said rate as hereinbefore decreed.

And it appearing that the sale price of the properties sold herein and designated as "Sale Parcel B" was $25,500.00, and that the several allowances and costs to be paid therefrom amount to the sum of $1,005.40, as above shown, the Court doth further find that the residue of said sale price, to-wit, the sum of $24,494.60, will be available for distribution to the respective unsecured creditors of the Wayne United Gas Company and otherwise in the manner hereinbefore decreed.

And said special commissioners now reporting in open Court that the Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, as assignees of H. G. Phillips, the purchaser of all of said properties at the sale heretofore made, reported and confirmed herein, propose to tender to said special commissioners in payment for the properties designated as "Sale Parcel A" the first mortgage bonds of said Wayne United Gas Company in the principal amount of $1,350,000.00, and the interest coupons thereto attached as aforesaid, it is hereby further adjudged, ordered and decreed that said special commissioners be authorized to accept such bonds in payment of such purchase price, at the distributive value above found, namely, $767.576 per

$1,000.00 of par or face value, or a total value for said bonds of $1,036,227.60, and the residue of said price of $1,200,000.00, to-wit, the sum of $163,772.40, be collected by them in cash, together with the sum of $25,500.00 representing the purchase price of said "Sale Parcel B," after deducting the sum of $22,000.00 deposited with said special commissioners by the purchaser prior to sale; the respective amounts to be so collected by them hereunder being as follows:

$1,350,000 of first mortgage bonds, at distributive value herein found		$1,036,227.60
Cash, for payment of allowances and expenses herein allowed out of "Sale Parcel A"		76,268.76
Cash, for distribution to $114,000 of outstanding first mortgage bonds out of "Sale Parcel A"		87,503.64
Cash, for payment of allowances herein made for payment out of "Sale Parcel B"		1,005.40
Cash, for distribution to unsecured creditor out of "Sale Parcel B"		24,494.60
	1,225,500.00	
Less deposit	22,000.00	
		$1,203,500.00

Upon payment of said purchase price, in the manner above indicated, said special commissioners shall execute, acknowledge and deliver to the purchaser or his assignees the deed heretofore provided for, by said decree of December 2, 1936, and other decrees herein, and the receivers herein, Herman Bennett and Ross B. Thomas, shall pay

over to said purchaser or assignees all moneys then in their hands, and deliver to them the possession of all other properties of the Wayne Gas Company in their custody, possession or control, as heretofore decreed.

Said special commissioners shall endorse, stamp or print upon each bond tendered and received in payment as aforesaid, a credit of the distributive value of such bond, at the rate herein decreed.

Upon receipt of said purchase price and delivery of deed, said special commissioners shall forthwith pay out of the moneys received, the respective allowances made in this decree, to the several parties entitled thereto; and in case they shall find that the cost of stamps for deed and incidental expenses, as set out herein, are less than the respective amounts collected by them for the purpose, they shall repay the excess to the purchaser or his assignees from whom the same is received. Thereupon said special commissioners shall forthwith report to the Court the amount of moneys remaining in their hands, available to the first mortgage bondholders and to the other creditors of Wayne United Gas Company, respectively, for further order of the Court herein.

The written opinion of the Court, fixing the several allowances herein made, marked "Court's Memorandum on Petition for Allowance," is now ordered to be filed herein and made a part of the record.

The petitioners, The Bank of New York & Trust Company, Trustee, et als., and Wallace G. Berlin, et als., objected, and made their objection to the Court, to any disbursements of the funds now in, or to come into the hands of the Special receivers, and now in, or to come into, the hands of the special commissioners; and

The Wayne United Gas Company objected, and made its objection to the Court, to the allowances aforesaid, and each of them, and also objected, and made its objection to the Court, to any disbursements of the funds now in, or to come into, the hands of the special receivers, or now in, or to come into, the hands of the special commissioners, until after the proceedings pending in the federal courts (which proceedings are referred to in the stipulation dated October 14, 1936, and heretofore filed as part of the papers in this cause by an order of the Court) have been finally disposed of by the federal courts; and

The Wayne United Gas Company further objected to the provisions of the foregoing decree wherein the special commissioners named therein were thereby directed to make and deliver to the Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company the deed as therein provided for; and

The Wayne United Gas Company moved the court to direct the said special receivers to defer and postpone the execution of such deed until the further order of the court; and

The Wayne United Gas Company further moved the court to defer and postpone all disbursements of the aforesaid moneys and the execution of the aforesaid deed until after the federal courts have finally passed upon the aforesaid proceedings pending therein.

And the court having heard the arguments of counsel upon said objections and said motions of the said The Bank of New York & Trust Company, et als., and Wallace G. Berlin, et als., and the Wayne United Gas Company is of opinion to over-rule the same.

It is therefore accordingly ADJUDGED, ORDERED and DECREED that said objections and said motions are,

and each is, hereby overruled, to which action of the court, in overruling such objections and motions, the said The Bank of New York & Trust Company, et als., Wallace G. Berlin, et als., and The Wayne United Gas Company, excepted.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, M. H. HIX, Clerk of the Circuit Court for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 21st day of December, 1936.

(SEAL)

M. H. HIX,
Clerk Circuit Court,
Kanawha County, West Virginia.

(Authentication omitted in printing; same as certificates to Exhibit A, except dated December 21, 1936.)

EXHIBIT F.

Indenture dated the 17th day of December, 1936, between H. Rummel Anderson and Thomas B. Jackson, of Charleston, West Virginia, as Special Commissioners appointed in and by the decree of sale entered on July 13, 1934, in the Circuit Court of Kanawha County, West Virginia, in a cause therein pending entitled "John B. Bell and Commonwealth Gas Corporation, a corporation, Plaintiffs, v. Wayne United Gas Company, a corporation, The Chase National Bank of the City of New York, a corporation, Trustee, and Paul C. Beardslee, Trustee, et als., Defendants, in Chancery, No. 11,668," (hereinafter called the Special Commissioners), parties of the first part, The Chase National Bank of the City of New York, a national banking association organized and existing under the laws of the United States of America and Paul C. Beardslee of Westfield, New Jersey, as Trustees under a certain indenture (hereinafter called the First Mortgage) made by Wayne United Gas Company to Interstate Trust Company and Paul C. Beardslee, as Trustees (hereinafter called the Trustees), parties of the second part, Ross B. Thomas and Herman Bennett, as Special Receivers of Wayne United Gas Company and of all its property situated in the State of West Virginia (hereinafter called the Receivers), parties of the third part, H. G. Phillips, of Toledo, Ohio (hereinafter called the Bidder), party of the fourth part, and Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, corporations organized and existing under the laws of the State of Ohio (hereinafter called the Purchasers), parties of the fifth part.

(Text of deed omitted in printing; printed copy filed with original motion in Clerk's office.)

EXHIBIT G.

STATE OF WEST VIRGINIA:

At a regular term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, May 21, 1935, the following order was made and entered, to-wit:

JOHN B. BELL, *et al*, Plaintiffs Below,

8056 vs.

WAYNE UNITED GAS COMPANY, *et al*, Defendants Below,

BANK OF NEW YORK & TRUST COMPANY, *Trustee, et al*, Appellants.

Upon an appeal from and supersedeas to a decree of the circuit court of Kanawha County, pronounced on the 13th day of July, 1934.

The court, having maturely considered the transcript of the record of the decree aforesaid, the exhibits therewith, and the arguments of counsel thereon, is of opinion, for reasons stated in writing and filed with the record, that there is error in said decree, but not such as to require reversal of the entire decree. It is therefore adjudged, ordered and decreed that the decree of the circuit court of Kanawha County, pronounced in this cause on the 13th day of July, 1934, be and the same hereby is set aside, reversed and annulled, in so far and in so far only as it fails to determine whether or not there has been a breach by Owens-Illinois Glass Company, Libbey-Owens Sheet Glass Company and Libbey-Owens-Ford Glass Company of the gas purchase contract of June 5, 1929, referred to in this proceeding, and if so breached the amount of resultant damages; but that the said decree be and it hereby is affirmed with respect to all other matters complained of by the appellants, and that the appellants do pay to the appellees their costs about their defense in this court in this behalf expended. And this cause is remanded to the circuit court of Kanawha County with

directions on the present proof to amplify its decree to the extent of finding whether the said gas purchase contract of June 5, 1929, was in fact breached, and if so breached, the amount of resultant damages; and for further proceedings to be had therein according to the principles stated and directions given in the written opinion aforesaid, and further according to the rules and principles governing courts of equity; all of which is ordered to be certified to the circuit court of Kanawha County.

The decision of points in the foregoing cause, as the same appears from the syllabus and written opinion prepared by Judge Kenna, was concurred in by Judges Litz and Hatcher. Judges Maxwell and Woods dissented from so much of said opinion as affirms the finding of said circuit court that the Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company are the bona fide owners of the bonds purchased by them, and referred to in said decree. Judge Maxwell filed a dissenting memorandum concurred in by Judge Woods.

And at another day, to-wit, July 23, 1935, the following was made and entered:

* * *

* * *

8056 JOHN B. BELL, *et al*, *vs.* WAYNE UNITED GAS COMPANY, *et al*;

* * *

* * *

* * *

Petitions for rehearing and re-argument having been filed in the six foregoing causes under the provisions of the rules of the court, it is ordered that said petitions be docketed and that the final judgments or decrees entered in said causes

at the January regular term be and they hereby are suspended until the further order of the court.

And at another day, to-wit, July 25, 1935, the following order was made and entered:

8056 JOHN B. BELL, *et al*, *vs.* WAYNE UNITED GAS COMPANY, *et al*;

The Court, having maturely considered the petition for re-hearing and re-argument filed in the foregoing cause, the majority thereof is of opinion to and hereby doth deny the prayer of said petition, and doth order that the final decree entered in said cause at the January, 1935, term, be made absolute and be certified as heretofore directed. Thereupon the appellants moved the court to set aside this order and reconsider said petition for rehearing. Of which motion the court takes time to consider.

And at another day, to-wit, October 28, 1935, the following order was made and entered:

JOHN B. BELL, *et al*, Plaintiffs Below,

8056 vs.

WAYNE UNITED GAS COMPANY, *et al*, Defendants Below,

BANK OF NEW YORK & TRUST COMPANY, *Trustee, et al*, Appellants.

Upon an appeal from and supersedeas to a decree of the Circuit Court of Kanawha County, pronounced on the 13th day of July, 1934.

The court, having maturely considered the motion of the appellants filed herein on the 25th day of July, 1935, to set aside the order entered on said date denying a rehearing in this cause, is of opinion to and doth hereby overrule said motion, and doth order that the order entered in this cause on the 21st day of May, 1935, be and the same hereby is made absolute, and that the same be certified as heretofore directed.

EXHIBIT H.

And at another day, to-wit, November 9, 1936, the following order was made and entered:

JOHN B. BELL, *et al*, *vs.* WAYNE UNITED GAS COMPANY, *et al*;

This day came The Bank of New York & Trust Company, trustee, The Chemical Bank & Trust Company, Edward F. Moore, Commonwealth Gas Corporation, Wallace G. Berlin, Wert D. Brougher, Robert H. Conlyn, Anna A. Hays, Ellinor B. Hays, Katherine E. Morrison, Philip L. Morrison, Glenn E. Todd, Frances A. Waterhouse and Gertrude Hemler Tracy, by Blue, Dayton & Campbell and Price, Smith & Spilman, their attorneys, and presented to the court a petition praying for an appeal from and supersedeas to a decree of the circuit court of Kanawha County, pronounced on the 10th day of August, 1936, in a cause in which John B. Bell and another were plaintiffs, and said petitioners and others were defendants, with a record of the decree aforesaid accompanying the petition, which being seen and inspected by the court, the appeal and supersedeas prayed for is refused.

STATE OF WEST VIRGINIA:

I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals, hereby certify that the foregoing are true copies of the orders of said Court entered on May 21, 1935, July 23, 1935, July 25, 1935, October 28, 1935, and November 9, 1936, respectively, in the cause of John B. Bell, et al, vs. Wayne United Gas Company, et al, No. 8056; which cause is reported in volume 116 of the West Virginia Reports, at page 280.

In Testimony Whereof, I have hereunto set my hand,

and affixed the seal of said Supreme Court of Appeals, this 30th day of December, 1936, and in the 74th year of the State.

(SEAL)

WM. B. MATHEWS,
Clerk Supreme Court of Appeals.

STATE OF WEST VIRGINIA, to-wit:

I, M. O. LITZ, Acting President of the Supreme Court of Appeals of the State of West Virginia, do hereby certify that Wm. B. Mathews is Clerk of said Court and was Clerk at the time of making and subscribing to the foregoing certificate, and that the attestation of said Clerk is in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name, at Charleston, West Virginia, this the 30th day of December, 1936, and in the 74th year of the State.

M. O. LITZ,
Acting President Supreme Court of Appeals.

STATE OF WEST VIRGINIA, to-wit:

I, WM. B. MATHEWS, Clerk of the Supreme Court of Appeals of West Virginia, do hereby certify that Honorable M. O. Litz, whose name is subscribed to the foregoing certificate, was at the time of subscribing the same, Acting President of the Supreme Court of Appeals of the State of West Virginia, duly commissioned and qualified, and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Charleston, in said State, this the 30th day of December, 1936, and in the 74th year of the State.

(SEAL)

WM. B. MATHEWS,
Clerk of the Supreme Court of Appeals of West Virginia.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 305

WAYNE UNITED GAS COMPANY, *Petitioner*,

vs.

OWENS-ILLINOIS GLASS COMPANY, LIBBEY-OWENS-FORD GLASS COMPANY, *Et Al.*

NOTE OF ARGUMENT IN SUPPORT OF MOTION TO DISMISS WRIT OF CERTIORARI.

If the facts presented by this motion show that no ultimate relief can be realized by the petitioner, we assume that the Court will not proceed to determine the legal questions sought to be raised by the writ of certiorari. We understand that it is without jurisdiction to do so.

It appears from the record, and from the facts set out in the motion to dismiss, that the debtor company had been in receivership for more than three years prior to the filing of the petition in bankruptcy, and that proceedings to foreclose a first mortgage upon its property had been pending for practically the same period of time. Originally, two receivers were appointed upon application of creditors, but immediately the first mortgage trustees intervened, praying a foreclosure, and upon their motion one receiver was substituted as representing their interests. These proceedings were in the Circuit Court of Kanawha County, West Virginia, with an ancillary receivership in the State of Kentucky, where a small portion of the properties of the company are located—probably less than five per cent in value.

On July 13, 1934, a decree of sale was entered by the West Virginia court, adjudicating the amount of the first mortgage indebtedness, the other liens and debts in their proper order, decreeing payment, and directing sale of the properties by special commissioners. From that decree an appeal was taken by certain holders of junior liens. The Supreme Court of Appeals of West Virginia on May 21, 1935, reversed the decree of sale in so far only as it failed to determine in advance of the sale whether or not there had been a breach by the Glass Companies of a certain gas purchase contract between them and the debtor company. It remanded the cause to the Circuit Court with directions to determine this question, and in case a breach was found, to assess the resultant damages, and in all other respects the decree of sale was affirmed. (Exhibit G.) *Bell v. Wayne United Gas Co.*, 116 W. Va. 280, 181 S. E. 609. Upon remand, the Circuit Court found that there had been no breach of the contract, and no damages to be assessed. The same junior lienors applied to the Supreme Court of Appeals for an appeal from this finding, but the same was refused on November 9, 1936. (Exhibit H.)

After the decision of the Supreme Court of Appeals had become final, the present petition in bankruptcy under Section 77B was filed by the debtor company, and no further proceedings were taken in the State courts until the dismissal of the second appeal in the bankruptcy proceedings by the Circuit Court of Appeals. The two Glass Companies and others filed objections to the reorganization petition, and the same was finally dismissed without approval on May 28, 1936.

The order of the Circuit Court of Kanawha County finding that no breach of the gas purchase contract had occurred

was entered on August 10, 1936, and by that order the special commissioners appointed in the original decree of sale of July 13, 1934, were directed to proceed with the sale. (Exhibit A.) They advertised and held the sale on October 1, 1936, at which time the West Virginia properties were purchased by H. G. Phillipps, on behalf of the Glass Companies, for the sum of $1,225,500. Exceptions were filed to the report of sale and its confirmation, alleging three grounds: (1) the pendency of the present writ of certiorari in this Court; (2) the pendency of a petition to the Supreme Court of Appeals of West Virginia for an appeal from the order of August 10, 1936; and (3) that the sale price was inadequate. (Exhibits B, C and C-1.)

The Circuit Court did not act upon the report of sale until after the appeal from the order of August 10, 1936, had been refused by the Supreme Court of Appeals, but on December 2, 1936, it overruled the exceptions and confirmed the sale. No evidence as to the alleged inadequacy of price was offered, and the Court found that the price was fair and adequate. (Exhibit D.)

The Circuit Court on December 21, 1936, fixed the amounts of certain allowances to be paid out of the purchase money (Exhibit E), and on that date the Glass Companies, as assignees of the purchaser, paid the full purchase price and accepted from the special commissioners a deed of conveyance for all the West Virginia properties, and have taken possession of the same. (Exhibit F.) The Wayne United Gas Company and certain junior lienors at that time objected to the payment of the allowances and the delivery of the deed until the bankruptcy proceedings were terminated.

I.

The properties of the debtor company having been sold, and title having become vested in the purchasers, no reorganization under Section 77B of the Bankruptcy Act is possible, and the case is moot.

The plan of reorganization proposed by the debtor is based upon the retention of its properties by the debtor or by a new company to be created, and it is obvious that without the properties no reorganization could be had. These properties were subject to a first mortgage of far greater amount than the value of the properties, as found by the district court, and as proven by foreclosure sale. Suit for foreclosure of the first mortgage had been pending for more than three years when the petition in bankruptcy was filed. No steps were taken to enjoin or stay proceedings in that suit, and in due course the sale was made and confirmed, and title to the properties vested in the purchasers.

First mortgage bonds in the principal amount of $1,350,000 (92% of those outstanding) were held by the Glass Companies, which became the purchasers of the properties, and their bonds were used in making the purchase, at their distributive value as found in the suit, and have been cancelled to that extent and so endorsed.

We submit that in this situation the entire object of the bankruptcy proceeding must necessarily fail, that no plan of reorganization can be effective, and that no relief can ultimately be granted the petitioner, no matter what view the Court may take of the legal questions sought to be raised upon the present writ. The Court can not be asked to decide such legal questions in the abstract, when it is plain that no real interest of the petitioner can be served thereby.

The principle upon which we rely has been well stated by this Court in *Mills v. Green*, 159 U. S. 651, in the following language:

> "The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this Court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence."

In the case cited, the Court discusses the principle and illustrates it by numerous citations. The same rule has been adhered to uniformly, as the Court pointed out in the later case of *American Book Co. v. Kansas*, 193 U. S. 49. Typical illustrations of the principle are the cases where by change of conditions, lapse of time, expiration of terms of office, and the like, it is no longer possible for the court to give effective relief. In the *Mills* case, the plaintiffs sought the right to vote at an election, and the election was held pending the suit. In the *American Book Company* case, the appellant had complied with the decree complained of, which left no actual controversy pending. In *Maloney v. Condon*, 189 U. S. 64, the controversy involved title to an office, and the term expired pending suit. It was there urged that the questions involved were of public importance and should

be decided, but the Court dismissed the writ of error, saying:

> "If we were to hold that the act could be subjected to the test of the 14th Amendment, and that it could not stand that test, we should do nothing more than reverse the decree below and remand the cause, and, as such a judgment would be ineffectual, we must decline to intimate any opinion on the subject."

A case may be moot for a variety of reasons. It is said in *Ex parte Steele*, 163 Fed. 694, 701:

> "It is universally understood by the bench and bar * * * that a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy."

The present case falls within the last mentioned category, and any judgment hereafter rendered by any court in the bankruptcy proceedings would be, as said by the court in *State v. Lambert*, 52 W. Va. 248, "wholly barren of practical or substantial results." This Court said as recently as *Brownlow v. Schwartz*, 261 U. S. 216: "This court will not proceed to a determination when its judgment would be wholly ineffectual for want of a subject-matter on which it could operate." In that opinion a great number of the authorities are cited. There is a full discussion of moot cases also in chapter 32 of Robertson & Kirkham, Jurisdiction of the Supreme Court, where it is said:

> "In determining whether a cause is moot the test is whether, at all stages of the litigation, there is 'an actual controversy, and adverse interests,' capable of being acted upon by a judgment which can be carried into effect. The fact that the proceeding is an amicable one does not preclude the existence of a real dispute between the parties concerning some matter of right; * * * . But where there is no real dispute between the plaintiff and defendant, either because the suit is seen to have been collusive from its inception, or through subsequent events the controversy has been extinguished or the cause of action has ceased to exist; or where the questions sought to be reviewed are wholly abstract, or the happening of events has rendered it impossible for the Court to grant any effectual relief, the cause must be treated as moot." (Sec. 248.)

It has been said that the lack of jurisdiction of this Court to decide moot questions is constitutional, and that its jurisdiction extends only to "cases" or "controversies" between actual parties litigant, where the Court can grant effective relief. No other kind of controversy can call forth the exercise of the judicial power. See, on this point:

> *United States v. Alaska S. S. Co.*, 253 U. S. 113.
> *California v. San Pablo & T. R. Co.*, 149 U. S. 308.
> *Willing v. Chicago Auditorium Assn.*, 277 U. S. 274.
> *Swift & Co. v. United States*, 276 U. S. 311.
> *Fairchild v. Hughes*, 258 U. S. 126.
> *Interstate Commerce Comm. v. Brimson*, 154 U. S. 447.

The filing of the petition for reorganization did not, of itself, divest the State court of jurisdiction to proceed with

the sale of the debtor's properties under its mortgage. Receivers were in possession pending foreclosure and the decree of sale had been entered more than a year before the bankruptcy petition was filed. Under general bankruptcy law, clearly the jurisdiction of the State court was not ousted. See *Straton v. New*, 283 U. S. 318, and note in 75 U. S. L. Ed. 1078. And this is true where the State court is proceeding to enforce a specific lien under a cross-bill brought by the mortgagee. *In re Dayton Coal & Iron Co.*, 291 Fed. 390.

While the bankruptcy court, by express provisions of Section 77B, may stay judicial proceedings to foreclose liens, this is only *after approval* of the petition. And the provision is not self-executing; the stay does not follow automatically upon the approval. *Duparquet Huot & Moneuse Co. v. Evans*, 297 U. S. 216; *In re Murel Holding Corporation*, 75 F. (2d) 941. Therefore, since no stay was asked or granted, the jurisdiction of the State court continued, and the assets of the debtor having been properly disposed of by that Court, there is nothing in existence upon which the debtor can base a reorganization.

Finality of Proceedings in the State Court. Our motion shows that under the West Virginia statutes a discretionary appeal may be obtained upon petition filed within eight months from the date of any final or appealable decree. The original decree of sale adjudicated the principles of the cause and constituted the authority for the sale finally made. It was entered on July 13, 1934, and was appealed from and affirmed, except in the single respect above noted (requiring a finding as to whether the gas sales contract had been breached). The supplemental decree of sale was en-

tered on August 10, 1936, and a petition for appeal therefrom was presented to the appellate court and refused. The only open question involved in that decree was as to whether or not there had been a breach of the gas sales contract. A petition for appeal may again be presented within the eight months period, but the question has been once passed upon by the Supreme Court of Appeals.

The decree confirming the sale was entered on December 2, 1936, and at the date of this memorandum no appeal therefrom has been asked for, nor has any party requested a suspension or stay of the order, or of the direction to the special commissioners to collect the purchase money and deliver deed for the properties. No grounds for appeal from the decree of confirmation can be perceived, as the sale was fairly made and the price is admittedly fair and adequate; at least, no evidence was offered to the contrary.

There is, then, only the bare legal possibility that any of the proceedings in the State court since the first appeal may be reversed if appropriate appellate action is taken in the future. The decree of July 13, 1934, however, adjudicating the mortgage indebtedness and directing sale of the properties, is in law a finality. When that decree was affirmed, there was no longer any possibility of a reorganization of the debtor based upon ownership of the properties, and this is now emphasized by the actual passing of title from the Gas Company. It seems to us that this Court must act upon the facts as it finds them at this time. If the appellant would present any changed condition to the Court, it must first accomplish the change. Title to the properties formerly owned by the Wayne United Gas Company is now vested in others. As the case stands today, all

possibility of a reorganization of the company has vanished. To continue litigation with a view to reorganization is wholly futile.

We respectfully submit that the writ of certiorari should be dismissed.

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Counsel for Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, Respondents.

January 4 1937.

CHRONOLOGY OF PROCEEDINGS

1934

July 13 Decree of sale, adjudicating indebtedness and decreeing payment.

1935

May 21 Reversal of decree of sale, in part, by Supreme Court of Appeals.

July 25 Rehearing refused, but motion made for reconsideration.

Oct. 28 Order of Supreme Court of Appeals became final.

Nov. 25 Bankruptcy petition filed by debtor.

1936

Mch. 2 Petitions dismissed.

Apr. 15 Appeal (Sec. 24b) denied by C.C.A.

Apr. 24 Petition for rehearing filed in District Court.

May 12 Rehearing granted.

May 28 Petitions again dismissed.

June 11 Appeal taken (Sec. 25a).

July 4 Appeal dismissed by C.C.A.

Bankruptcy proceedings. (No action in State court.)

July 28 Hearing in Circuit Court of Kanawha County on mandate.

Aug. 10 Order of Circuit Court finding no breach of contract, and directing sale under decree of July 13, 1934.

Aug. 22 Petition for certiorari filed in bankruptcy suit.

Oct. 1 Property sold under decree.

Oct. 12 Certiorari granted by Supreme Court in bankruptcy suit.

Nov. 9 Appeal from Circuit Court order of August 10th, refused by Supreme Court of Appeals of West Virginia.

Dec. 2 Sale confirmed by Circuit Court.

Dec. 21 Allowances determined, purchase price paid, and deed delivered for properties.

SUPREME COURT OF THE UNITED STATES.

No. 305.—October Term, 1936.

Wayne United Gas Company, Petitioner, *vs.* Owens-Illinois Glass Company, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[February 1, 1937.]

Mr. Justice Roberts delivered the opinion of the Court.

The Circuit Court of Appeals has decided that a District Court is without power to set aside its order dismissing a petition for reorganization under Section 77B of the Bankruptcy Act and to rehear the cause after the expiration of the period allowed by the Act for appeal from the order.[1] To resolve a conflict of decision[2] we granted certiorari.

November 25, 1935, the petitioner filed in the District Court for Southern West Virginia a petition and, on December 10th, an amended and supplemental petition for corporate reorganization under Section 77B of the Bankruptcy Act as amended.[3] February 7, 1936, the respondents filed objections and motions to dismiss. March 2nd the petitions were dismissed. March 20th the petitioner presented to the Circuit Court of Appeals a petition for appeal, pursuant to Section 24 (b) of the Bankruptcy Act.[4] April 15th the court denied the appeal,[5] holding that the petitioner should have proceeded under Section 25 (a).[6] April 17th petitioner notified respondents that on April 24th it would present a petition to the District Court praying vacation of the order of March 2nd and

[1] 84 F. (2d) 965.

[2] See *West* v. *McLaughlin's Trustee*, 162 Fed. 124; *Cameron* v. *National Surety Co.*, 272 Fed. 874. This court has adverted to the question without deciding it. *Conboy* v. *First Nat. Bank*, 203 U. S. 141, 146.

[3] Act of June 7, 1934, 48 Stat. 911; Act of August 20, 1935, c. 577, 49 Stat. 664; Act of August 29, 1935, c. 809, 49 Stat. 965; 11 U. S. C. Sec. 207.

[4] Act of July 1, 1898, c. 541, Sec. 24 (b), 30 Stat. 553; 11 U. S. C. Sec. 47.

[5] *Wayne United Gas Co.* v. *Owens*, 83 F. (2d) 98. See *O'Connor* v. *Mills*, No. 442, decided this day.

[6] Act of July 1, 1898, c. 541, Sec. 25 (a), 30 Stat. 553, 11 U. S. C. Sec. 48 (a).

a rehearing and review of all matters arising in the proceedings because of errors committed by the court in dismissing its petitions, and that, upon rehearing, the court would be asked to enter an order approving the original and amended petitions. After presentation of the petition for rehearing and argument thereon the court directed that it be filed, took the matter under advisement, and, on May 12th, set aside the order of March 2nd, granted a rehearing and review and fixed May 22nd for a hearing on all questions arising on the record. The court found that good cause existed justifying vacation of its previous order and reconsideration of the cause. It further found that the application had been seasonably presented and no rights had vested under the order of March 2nd which would be disturbed by setting the order aside. By leave of court the petitioner, on May 22nd, presented a second amended and supplemental petition, which incorporated the earlier petitions for reorganization, and asked the court to find that the original and supplemental petitions were filed in good faith and complied with Section 77B. The respondents objected. May 28th the court, after a hearing, sustained the respondents' objections and dismissed the petitions for reasons set forth in findings of fact and conclusions of law. June 11th petitioner's application to the judge of the District Court, under Section 25 (a) of the Act, for an appeal, with supersedeas, was granted. The Circuit Court of Appeals, on respondents' motion, dismissed the appeal.

1. The respondents have moved to dismiss the writ of certiorari on the ground that the controversy has become moot. In support of the motion they show that for some time prior to the institution of the 77B proceedings the debtor's property had been in possession of a receiver appointed by a state court; that the trustee of a first mortgage had intervened in the receivership proceeding and sought foreclosure; that the state court had ordered a sale of all the debtor's property and the decree of sale had become final before the presentation of the petition for reorganization. They show that subsequent to the order of March 2nd dismissing the petition for reorganization further action by the state court resulted in the confirmation of a commissioner's sale, payment of the purchase price partly in cash and partly in first mortgage bonds of the debtor and execution and delivery of a deed to the purchaser, a nominee of respondents. It appears not only that the respondents were parties

to the 77 B proceeding but that, prior to the consummation of the sale, the state court was fully advised of the steps taken in the federal courts and of the pendency of the petition for certiorari in this court to review the order of the Circuit Court of Appeals dismissing the appeal.

The respondents went forward with the proceedings in the state court, looking to a sale of the debtor's property, with full knowledge that a rehearing might be granted and that the order entered thereon might be appealed. They are not entitled, therefor, to rely on any status acquired in the state court suit as precluding further consideration of the petition for reorganization. The motion must accordingly be overruled.

2. The petitioner asserts that the grant or refusal of a rehearing rested in the sound discretion of the District Court and since in the proper exercise of that discretion the court entertained the application and reheard the case upon the merits, its action again dismissing the petition for reorganization was a final order and the appeal therefrom was timely. The respondents contend that the first order of dismissal having terminated the cause, and the thirty days allowed by the bankruptcy act for appeal from the order having expired, the District Court was without power to entertain a petition for rehearing and its second order of dismissal was a nullity. Wherefore they say the appeal taken more than thirty days from the date of the original order of March 2, 1936, if considered as challenging that order, was out of time, and the motion to dismiss was properly granted by the Circuit Court of Appeals. We hold the petitioner's position is sound and the appeal should have been entertained.

Though a court of bankruptcy sits continuously and has no terms,[7] respondents urge that, as courts of bankruptcy are courts of equity, the rules applicable to the rehearing of a suit in equity should be applied in bankruptcy cases, and as it appears the term of the District Court expired April 20, 1936, the court had lost its power to disturb the order of March 2nd. A court of equity may grant a rehearing, and vacate, alter, or amend its decree, after

[7] *Sandusky* v. *National Bank*, 23 Wall. 289, 293; *In re Lemmon & Gale Co.*, 112 Fed. 296, 300; *Freed* v. *Central Trust Co.*, 215 Fed. 873, 876; *In re Rochester Sanitarium & Baths Co.*, 222 Fed. 22, 26.

an appeal has been perfected and after the time for appeal has expired, but not after expiration of the term at which the decree was entered.[8] It is true the bankruptcy court applies the doctrines of equity, but the fact that such a court has no terms, and sits continuously, renders inapplicable the rules with respect to the want of power in a court of equity to vacate a decree after the term at which it was entered has ended.

In the alternative the respondents argue that where, as here, an adjudication is refused, and the case is retired from the docket, the requirement that an appeal shall be perfected within thirty days from the order of dismissal deprives the court of power to reinstate and rehear the cause after the expiration of the time limited for appeal. They insist that the act contemplates the speedy disposition of causes in bankruptcy and therefore fixes a brief period for appealing from orders therein. To permit the court to rehear a cause after the time for appeal has expired, and to enter a fresh order which is appealable, would, they urge, tend unduly to extend the proceedings, create uncertainty as to the rights of the debtor and creditors, and ignore the intent of Congress. But we think the court has the power, for good reason, to revise its judgments upon seasonable application and before rights have vested on the faith of its action. Courts of law and equity have such power, limited by the expiration of the term at which the judgment or decree was entered and not by the period allowed for appeal or by the fact that an appeal has been perfected.[9] There is no controlling reason for denying a similar power to a court of bankruptcy or for limiting its exercise to the period allowed for appeal. The granting of a rehearing is within the court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal.[10] A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to

[8] Equity rule 69; *Aspen Mining Co.* v. *Billings*, 150 U. S. 31, 36; *Voorhees* v. *Noye Mfg. Co.*, 151 U. S. 135; *Zimmern* v. *United States*, 298 U. S. 167.

[9] *United States* v. *Mayer*, 235 U. S. 55; *United States* v. *Benz*, 282 U. S. 304; and cases cited in Note 8.

[10] *Brockett* v. *Brockett*, 2 How. 238; *Steines* v. *Franklin County*, 14 Wall. 15; *Hardin* v. *Boyd*, 113 U. S. 756; *Boesch* v. *Gräff*, 133 U. S. 697; *San Pedro &c. Co.* v. *United States*, 146 U. S. 120.

entertain it, does not extend the time for appeal.[11] Where it appears that a rehearing has been granted only for that purpose the appeal must be dismissed.[12] The court below evidently thought the case fell within this class. On the contrary, the rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case upon the merits; and even though it reaffirm its former action and refuse to enter a decree different from the original one, the order entered upon rehearing is appealable and the time for appeal runs from its entry.[13] The District Court's action conformed to these conditions. Two days after the Circuit Court of Appeals dismissed the petition for allowance of appeal from the original order of March 2, 1936, petitioner notified respondents of its intention to apply for rehearing. Prompt application was made and the cause was promptly heard. A supplemental petition was presented and entered upon the files by leave of court. The original, the amended, and the supplemental petition were considered upon the merits, and the court made findings and announced conclusions of law with respect thereto. There is no indication that the petition for rehearing was not made in good faith or that the court received it for the purpose of extending petitioner's time for appeal. The court found that no rights had intervened which would render it inequitable to reconsider the merits. There was no abuse of sound discretion in granting the motion and reconsidering the cause.

The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity to this opinion.

So ordered.

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[11] *Roemer* v. *Bernheim*, 132 U. S. 103, 106; *Morse* v. *United States*, 270 U. S. 151, 154; *Clarke* v. *Hot Springs Elec. L. & P. Co.*, 76 F. (2d) 918, 921.

[12] *In re Stearns & White Co.*, 295 Fed. 833; *Bonner* v. *Potterf*, 47 F. (2d) 852, 855; *United States* v. *East*, 80 F. (2d) 134, 135.

[13] Compare *Aspen Mining Co.* v. *Billings*, *supra*, p. 37; *Voorhees* v. *Noye Mfg. Co.*, *supra*, p. 137; *Citizens Bank* v. *Opperman*, 249 U. S. 448, 450; *Morse* v. *United States*, *supra*, p. 154.